Over the Term.

Filed.

Rev. Aff. 11-153, 1879

No. 19:693

Dec. 4. 1879

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 563.

WILLIAM CUMMINGS, TREASURER OF LUCAS COUNTY, APPELLANT,

VS.

THE MERCHANTS' NATIONAL BANK OF TOLEDO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 15, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 563.

WILLIAM CUMMINGS, TREASURER OF LUCAS COUNTY, APPELLANT,

VS.

THE MERCHANTS' NATIONAL BANK OF TOLEDO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

INDEX.

	Original.	Print.
Bill of complaint	1	1
Subpœna	9	5
Marshal's return of subpœna	10	5
Injunction	10	5
Marshal's return of injunction	11	6
Answer	11	6
Supplemental bill	16	8
Motion to vacate	21	11
Motion to modify	22	12
Supplemental and amended answer	22	12
Decree	34	18
Certificate of evidence	35	18
Appeal bond	54	28
Opinion of Judge Baxter	56	28
Clerk's certificate	58	29

1 **Pleas in the circuit court of the United States for the Northern district of Ohio, held at the United States court-rooms, in the city of Cleveland, in the district aforesaid, before the judges thereof, on** Monday, the twenty-ninth day of April, in the April term of said court, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and second year.

AUGUSTUS J. RICKE, *Clerk.*

MERCHANTS' NATIONAL BANK OF TOLEDO
vs. } In chancery.
WM. CUMMINGS, TREASURER, &C.

NORTHERN DISTRICT OF OHIO, *ss :*

Be it remembered that on the twenty-sixth day of December, A. D. 1876, came said complainant, by Osborn and Swayne, its solicitors, and filed in the office of the clerk of the circuit court of the United States for said Northern district of Ohio, at Cleveland, in the district aforesaid, its bill of complaint in said entitled cause, which said bill is in the words and figures following, to wit:

Bill of complaint.

In the circuit court. In chancery.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss :

To the honorable the judges of the circuit court of the United States in and for the northern district of Ohio, in chancery sitting:

The bill of complaint of the Merchants' National Bank of Toledo respectfully represents:

That your orator is an incorporated banking institution or association, duly incorporated under and by virtue of the act of Congress entitled
2 "An act to provide for a national currency, secured by a pledge of United States bonds, and to provide for circulation and redemption thereof," approved June 3d, 1864. That under the provisions of said act and of the regulations of the Treasury Department of the United States, your orator became and was incorporated about the 6th day of October, A. D. 1871. That the capital stock of your orator now amounts to the gross sum of five hundred thousand dollars, and the same is divided into 5,000 shares of one hundred dollars each. That the banking institution and the business of your orator connected therewith is at the city of Toledo, in the county of Lucas, and in said northern district of Ohio.

Your orator further represents that it has hitherto, upon the requirements of the proper officers of the State of Ohio and of the county of Lucas, in said State, made full, complete, and accurate returns of the condition of its business, amount of its shares and their par value and the ownership thereof, and also of all its moneys, credits, and whatever else it may have been required to report, and that it has always been and is now ready and willing to pay its just rate of the taxes and assessments levied upon all other property, moneys, and credits in the State of Ohio and county of Lucas. But your orator complains and charges that heretofore the county auditor of said county of Lucas, acting or assuming to act under the authority of the laws of the State of

Ohio concerning the assessment, levy, and collection of taxes upon persons and property in said State, has caused your orator to be listed upon the records of his office for taxation, and has entered therein and charged against your orator, as a corporate banking institution, for taxes
3 and assessments for State, county, township, and city purposes,
for the year 1876, the total amount of twenty three thousand two hundred dollars, which amount, under the laws and regulations for collection of taxes and assessments in the State of Ohio, is payable one-half by the 20th day of December, 1876, and one half by the 20th day of June, 1877. That said auditor has delivered his duplicate of the listing and charges of taxes and assessments against persons and property in said county of Lucas for the year 1876, to William Cummings, the treasurer thereof, on which duplicate there is contained the aforesaid charge against your orator of the said taxes and assessments, amounting to the sum of $23,200, and that said treasurer is proceeding, under the laws of the State of Ohio, to receive, demand, and collect the taxes and assessments contained upon said duplicate, in the manner required by law.

Your orator further charges that the authorities of the State of Ohio have no right or authority, nor has the auditor of the county of Lucas any right or authority, to charge your orator as a corporation for the payment of any taxes whatever, except as to its real property which it may own, and which orator charges is already listed for taxation on the duplicate as such real property, under appropriate description, and that shares only as such in your orator's capital stock are taxable in said State by the laws thereof.

Your orator is informed and believes, and therefore charges, that stockholders owning shares in orator's bank have not been taxed upon such shares, and that none of the said shares have been listed for taxation, but, on the contrary, the officers of the State and county to
4 whom is committed the duty of charging, levying, and collecting
the taxes and assessments have listed and charged your orator, as an incorporated institution, with said taxes and assessments, and that they have attempted and are now seeking, illegally and without authority, to collect from your orator, as an incorporated banking institution, the whole of said taxes charged upon said duplicate, and have not charged the shares or the shareholders with any tax whatever on account of their interest therein.

Your orator further represents that the auditor of said county listed your orator and charged to it upon said duplicate the amount which is charged thereon, as above stated, for the taxes of 1876, at a rate and in accordance with instructions from the auditor of state of the State of Ohio fixing the taxable valuation of the shares of orator's bank. That the valuation of your orator's shares was so fixed and determined by a certain board known as the board of equalization of shares of banks and banking associations in this State, consisting of the auditor of State, the treasurer of State, and the attorney general, and which board was created by virtue of an act of the legislature of the State of Ohio, entitled "An act to provide for the equalization of the valuation of bank shares for taxation," passed April 12th, 1876. That by virtue of the laws of the State of Ohio the valuation and equalization of all other property, moneys, and credits for the purpose of taxation are determined by certain boards of equalization for State, county, and city purposes, whereby uniformity, equality, and proper proportion is secured in the taxation of all such property, moneys, and credits.

5 Your orator further represents that by the second section of the

twelfth article of the constitution of the State of Ohio it is provided, "That laws shall be passed taxing by uniform rule all moneys, credits, and investments in bonds, stocks, joint stock companies, or otherwise." And, also, that by the terms of the banking law aforesaid under which orator has become incorporated it is further provided that the taxation of the shares of the national banking associations by the legislature of any State shall not be at a greater rate than is assessed upon other moneyed capital in the hands of citizens of such State. Your orator charges that under the restrictions imposed by said laws the auditor of said county of Lucas had no right or power to determine and charge the value of the shares of your orator's bank at any other or greater rate than was provided for ascertaining and charging all other real and personal property, moneys, and credits in said county; and your orator charges that under and by virtue of said laws and the limitations thereof, the legislature of the State of Ohio had no right to organize and establish any tribunal for ascertaining the value of the shares of banking institutions which was not common and uniform to all other property in said State, county, and city, or which did not produce uniformity in the rules and methods of valuing property for taxation.

Your orator further represents and charges that by virtue of the
mode determined by the legislature of the State of Ohio, under the val-
uation of said board of bank equalization, and which has been carried
out by instructions from the auditor of State, the taxes levied upon and
charged to your orator are not uniform, equal, and in due propor-
6 tion with the taxes which are assessed and collected upon other
property. That the mode of determining the levy and assess-
ment thereof is not common and uniform with that for determining the
levy and collection of other taxes in the State of Ohio, and especially
in the county of Lucas aforesaid.

On the contrary your orator avers and charges that by means of said State board of bank equalization the methods and manner of taxation against bank shares are unequal and diverse, and result in unequal taxation as against bank shares and are unjust and illegal. That in consequence of said unjust and illegal modes of valuation of the shares of your orator and the instructions of the auditor of State to the county auditor of said county of Lucas the taxes assessed against orator for the year 1876 are nearly if not fully in a ratio much larger, namely, three times the proportionate amount which is charged to the real property, moneys, and credits listed for taxation in said county of Lucas and charged upon said duplicate now in defendant's hands for collection.

Orator further represents that said unequal and oppressive charges and assessments made by said State board for the year 1876 against the shares in your orator's bank are the natural and necessary operation of said act of April 12th, 1876, and as orator believes and charges the taxation and assessment of shares in your orator's bank under said law must be unjust and prohibitory while said law continues in force.

Orator further represents that the enactment and existence of said
law has already depreciated the value of its shares, and will, if
7 continued, destroy its business as a bank. Orator charges that
said law and said tax and assessments so imposed are in violation
of the constitution of the State of Ohio and of the act of Congress afore-
said, and the same are illegal, unequal, unjust, and oppressive upon or-
ator and prohibitory of its business as a bank.

Your orator further represents that he is informed and believes and charges the fact to be that since the duplicate for taxation in Lucas County, for the year 1876, was by the auditor of said county delivered to the treasurer of said county as required by law, the officers of said county have caused the said duplicate to be altered and amended by the insertion of an additional tax of two mills against your orator for interest on certain bonds issued by the city of Toledo in aid of the construction of water works in said city.

Your orator represents and charges that both the amendment and alteration of said duplicate as aforesaid, and the tax itself so levied, were unauthorized and forbidden by the laws of the State of Ohio.

Your orator further represents that the duplicate for taxes of Lucas County is already in the hands of the defendant, the treasurer of said county of Lucas. That unless the said taxes and assessments are paid according to the time fixed by law, to wit, on the 20th day of December, 1876, the defendant, as he is required by law to do, will issue his warrant to proceed by distress and sale to collect the amount hereinbefore named together with a large amount of penalty thereon and costs, and that a great and irreparable wrong and injury will thereby be done to your orator and to its credits and business.

8 Inasmuch, therefore, as your orator is remediless by the strict rules of law, and can only be relieved in this court where such matters are properly cognizable, your orator prays that process of subpœna may issue out of this court to make the said William Cummings party defendant hereto, that he may answer all and several the things hereinbefore stated, but not under oath; that a preliminary injunction or restraining order may be granted to restrain and enjoin him from receiving, having, demanding, or collecting the taxes and assessments upon the duplicate for taxes in his hands which are charged to and against your orator, as hereinbefore stated and described; and that at the final hearing of this case said taxes and assessments may be declared to be illegal and unjust and the said defendant perpetually enjoined from proceeding to collect the same.

OSBORN AND SWAYNE,
Complainant's Solicitors.

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

Be it remembered that on this 15th day of December, 1876, personally came Wilson W. Griffith before me, William Baker, United States commissioner in and for said district, who, being by me sworn, deposes and says that he is the president of the Merchants' National Bank of Toledo, plaintiff in the foregoing bill of complaint; that he has heard the same read and knows the contents thereof; that all the allegations and statements of fact therein stated as derived from the information of others he believes to be true, and all other allegations and statements therein contained are true in substance and in fact.

WILSON W. GRIFFITH.

9 Sworn to before me and subscribed in my presence this 15th day of December, 1876.

W. BAKER,
United States Commissioner.

(Endorsed): Filed, Dec. 26th, 1876. Chas. H. Bill, deputy clerk.

And on same day, to wit, the 26th day of December, A. D. 1876, a writ of subpœna, together with a memorandum and writ of injunction issued out of said clerk's office against said defendant, which said subpœna, memorandum and writ, together with the return of the marshal endorsed thereon, are in the words and figures following, to wit:

Writ of subpœna.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to the marshal of the northern district of Ohio, greeting:

You are hereby commanded to summon William Cummings, treasurer of Lucas County, Ohio, if he be found in your district, to be and appear in the circuit court of the United States for the northern district of Ohio aforesaid, at Cleveland, on the first Monday in February next, to answer a certain bill in chancery filed and exhibited in said court against him by the Merchants' National Bank of Toledo. Hereof he is not to fail under the penalty of the law thence ensuing, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 26th day of December, A. D. 1876, and in the 101st year of the Independence of the United States of America.

[SEAL.]
EARL BILL, *Clerk*,
By CHAS. H. BILL, *Deputy Clerk.*

MEMORANDUM.—The said defendant is required to enter his appearance in this suit, in the clerk's office of said court, on or before
10 the first Monday of February, 1877, otherwise the said bill may be taken pro confesso.

EARL BILL, *Clerk*,
By CHAS. H. BILL, *Deputy Clerk.*

Marshal's return.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 28th day of December, 1876, I delivered a true copy of this writ duly certified to the within named Cummings, treasurer of Lucas County, Ohio, at Toledo, Ohio.

N. B. PRENTICE, *U. S. Marshal*,
By O. W. CASE, *Deputy.*

(Endorsed): Returned and filed Dec. 29th, 1876. Chas. H. Bill, dep. clerk.

Injunction.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to William Cummings, treasurer of Lucas County, Ohio, greeting:

Whereas the Merchants' National Bank of Toledo, citizen of the State of Ohio, has filed on the chancery side of the circuit court of the United States within and for the northern district of Ohio, a bill against you, the said William Cummings, as aforesaid, and has obtained an allowance of an injunction as prayed for in said bill from the judges of said court:

Now, therefore, we, having regard to the matters in said bill contained, do hereby command and strictly enjoin you, the said William Cummings, treasurer, as aforesaid, from receiving, having, demanding, or collecting the taxes and assessments upon the duplicate for taxes in your hands which are charged to or against the said Merchants' National Bank of Toledo, as in their said bill described and stated, which commands and injunctions you are respectfully required to observe and obey, 11 until our said circuit court shall make further order in the premises. Hereof fail not, under penalty of the law thence ensuing.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 26th day of December, A. D. 1876, and in the 101st year of the Independence of the United States of America.

[SEAL.] EARL BILL, *Clerk*,
By CHAS. H. BILL, *Deputy Clerk*.

Marshal's return.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 28th day of December, A. D. 1876, I delivered a true copy of this writ, duly certified, to the within-named William Cummings, treasurer of Lucas County, Ohio, at Toledo, Ohio.

N. B. PRENTICE, *U. S. Marshal*,
By O. N. CASE, *Deputy*.

(Endorsed:) Returned and filed Dec. 29th, 1876. Chas. H. Bill, dep. clerk.

Afterwards, to wit, on the 5th day of March, A. D. 1877, said defendant, by his solicitor, filed in said clerk's office his answer in said entitled cause, which said answer is in the words and figures following, to wit:

Answer.

In the circuit court. In chancery.

THE UNITED STATES OF AMERICA,
Northern District of Ohio:

THE MERCHANTS' NATIONAL BANK OF TOLEDO
v.
WILLIAM CUMMINGS, TREASURER.
} Answer.

The defendant now comes and for answer to the complaint of the Merchants' National Bank of Toledo, Ohio, says: He admits the corporate existence of the plaintiff, and that it is doing business in the city of Toledo, Ohio.

He admits its capital stock to be as is stated in the petition. 12 He admits that the auditor of Lucas County, in making up the grand tax duplicate for said county for the year 1876, caused the aggregate value of the shares of the stock of said Merchants' National Bank, as returned and determined by the board of equalization of the value of shares of the banks and banking associations of the State of Ohio, after deducting the value of the real estate owned by said bank, to be assigned in the name of complainant. The defendant avers that the tax complained of stands on said duplicate as an assessment against the shares of stock owned by the different stockholders of said bank, and was not intended to be nor was it anything more than a tax or assessment against said shares, such as by the laws governing the taxation of bank stock and shares in banking corporations and institutions in the State of Ohio, the said auditor had a right and it was his duty to charge and assess.

The defendant says that by a clerical mistake and inadvert*ance* the auditor omitted to enter the total value of the shares of stock in the Merchants' Bank of Toledo, less the value of the real estate owned by said bank, in the name of the owners thereof, in the amounts proportioned to the number of shares owned by each, but did enter the total value of such shares, after deducting the value of the real estate as aforesaid, in the name of the *name of the* said Merchants' Nat. Bank.

Defendant says that such mistake was an error and irregularity which should not prevent the collection of the tax which said auditor had a right to assess, and which in fact was assessed on the stock owned by the shareholders in said bank. Defendant says that the Merchants'
National Bank was aware that in fact said assessment was not
13 against it as a corporation or against its property, but was against
the stock owned by its shareholders. Defendant is informed and
believes, and so charges the fact to be, that the said bank has, as it has a right to do, withheld from the dividends which were due and payable to the stockholders of said bank, on the stock owned by them, the amount livied and assessed against the stock of said bank, and that it has now in its possession, ready to be paid by the officers of said bank, the entire amount of said tax, or whatever amount could be legally assessed against said stock.

The said defendant, further answering, says that since the filing of the complaint in this case the tax has been charged against the stockholders, who are the owners of the stock in the said Merchants' National Bank, by entering upon the tax-duplicate of said county, and also upon the book of additionals and corrections, the total value of such shares as ascertained and fixed by said equalizing board, after deducting the assessed value of the real estate owned by said bank, in the names of the owners thereof, in amounts proportioned to the number of shares owned by each.

The defendant denies that the Merchants' National Bank now stands charged with the taxes against the shares of said bank, or that he is proposing or attempting to collect from said bank the amount of the tax and assessment charged and assessed against the shares of stock of said bank in any other manner than as provided by law for enforcing its lien on said stock for the taxes properly chargeable against the same.

The defendant, further answering, say' that he admits that the valua-
tion of the shares of stock in the Merchants' National Bank of
14 Toledo, as placed upon the duplicate for taxation, was fixed and
determined in accordance with the provisions of the acts of the
general assembly of the State of Ohio, passed April 16th, 1867, and April 12th, 1876. The value of said shares was first fixed and determined by the county auditor, and afterwards in accordance with the provisions of said act of April 12th, 1876, the value of said shares and all other shares of banks and bank associations in the State of Ohio were equalized by the State board of equalization as provided for in said act. Said shares are valued at their actual and true value in money, as determined by the proper authorities charged with the duty, under the laws of the State of Ohio, of assessing and listing said kind of property, and the taxes charged and assessed against said shares are the same and no more as is charged and assessed against other moneyed capital in the hands of individual citizens, as well as against all other personal prop-

erty in the city of Toledo, and such tax as could be lawfully assessed and collected.

The defendant says that he denies each and every allegation of fact in complainant's bill contained save and except such as are by this answer expressly admitted. He denies that the valuation of shares of the stock of plaintiff's bank as determined and assessed by the officers and boards provided for in and by virtue of the several statutes of the State of Ohio is excessive, illegal, unequal, and unconstitutional. He denies that the operation of said laws renders the taxes assessed against said shares of stock unequal, not uniform, or out of due proportion with the taxes which are assessed and collected upon other property. He
15 avers that the modes and methods provided by the laws of the State of Ohio for the valuation of said shares of stock are legal, just, and in compliance with the constitution of the State of Ohio, and not inconsistent with the laws of the United States governing and establishing national banking associations. He avers that the tax in complainant's bill complained of is in all respects and to the full amount thereof a lawful tax against the shares of stock of complainant's bank; that the same was assessed in all respects in accordance with law, and was levied by the State, county, and municipal authorities who had the right and authority to make said levies, and that the valuation of said shares was made by the properly constituted authorities as provided for by the laws of the State of Ohio, and that said tax upon the valuation as stated on the duplicate now in possession of the treasurer of Lucas County is in all respects lawful and constitutional, and the owners of the stock in said complainant's bank should be compelled to pay said tax.

Defendant therefore asks that the preliminary injunction heretofore allowed in this case may be dissolved and that complainant's bill may be dismissed at his costs.

J. K. HAMILTON,
Solicitor for Defendant.

UNITED STATES OF AMERICA,
Northern District of Ohio:

In the circuit court, in chancery.

STATE OF OHIO,
Lucas County, ss:

William Cummings, the defendant above named, makes oath and says that the statements in the foregoing answer contained are true in substance and in fact.

W. CUMMINGS,
Treas'r of Lucas Co.

16 Sworn to before me and subscribed in my presence this 1st day of March, A. D. 1877.

R. C. LEMMON,
Judge Court of Common Pleas.

(Endorsed:) Filed March 5th, 1877. Earl Bill, clerk.

Afterwards, to wit, on the 19th day of March, A. D. 1877, came said complainant, by Osborn and Swayne, its solicitor', and filed in the clerk's office of the circuit court of the United States for said northern district of Ohio, at Cleveland, in the district aforesaid, its supplemental bill of complaint in said entitled cause, which said bill is in the words and figures following, to wit:

Supplemental bill.

In the circuit court of the United States for the northern district of Ohio. In equity.

THE MERCHANTS' NATIONAL BANK OF TOLEDO,
plaintiff,
against
WILLIAM CUMMINGS, TREASURER OF LUCAS
County, Ohio, defendant.

And now comes your orator, the Merchants' National Bank of Toledo, Ohio, and having obtained leave, files its supplemental bill of complaint against William Cummings, treasurer Lucas County, Ohio, and respectfully represents to the court that—

Whereas the original bill of your orator filed herein represented that the taxes levied and assessed for the year 1876, in the city of Toledo, in Lucas County, in said district, had by the auditor of said county been extended and charged upon the tax duplicate of said county against your orator as an incorporated banking institution in proportion to the valuation put upon your orator's property as therein set forth, and 17 said auditor had not extended or charged the same against the shareholders of the capital stock of your orator as required by law, and that the said William Cummings, treasurer, was then threatening if said taxes were not paid by your orator on or before the twentieth day of December, 1876, to levy upon and distrain the property of your orator for payment of the same, and thereupon an order issued from this court restraining and enjoining the collection of said tax:

Now, therefore, your orator respectfully represents that since the said twentieth day of December, 1876, the auditor of said county of Lucas, in the State of Ohio, has proceeded to enter and enumerate upon the duplicate of said county the names of the holders of shares of your orator's capital stock, and the shares so held by them respectively, and to extend and charge against said shares the percentage of tax levied in said city of Toledo for city, county, and State taxes for the year 1876, upon the full valuation of said shares as valued and assessed under the methods in said original bill described, and therein alleged to be illegal and oppressive; and thereupon a large number of the holders of said shares have notified your orator that the said tax is illegal and oppressive, and, moreover, that the entry of their names on the duplicate of said county as holders of said shares was by the laws of Ohio forbidden to be made at the time it was so made, and was inoperative and void, and they do not intend to regard said entry or to pay said taxes, and they forbid your orator to pay and deduct the same from any dividend upon said shares or other funds belonging to said shareholders; and your orator is informed, and believes and charges, that said charges were made at a time and in a manner unauthorized by law, and are in- 18 operative and create no lien upon said shares, and that none of its shareholders have paid or intend to pay the taxes of 1876 upon their shares as now assessed unless compelled by law; but that, nevertheless, all of said shareholders are willing and desirous that your orator should pay the full tax levied in the city of Toledo for city, county, and State purposes, upon said shares if valued and assessed in such proportion to their actual value as the assessment of real and personal property at large in the city of Toledo bears uniformly to the value of said property, and should deduct the same from any dividends upon said shares or other funds in the possession of your orator and belonging to said shareholders.

And your orator being advised that the shares of its capital stock
have been entered and charged on the duplicate as above set forth,
and being ready and desirous to meet its proper share and burden of
the public revenue, has heretofore tendered to the said William Cummings,
treasurer, the sum of $4,361.60, being the full amount chargeable
in the city of Toledo for city, county, and State taxes, upon a valuation
of said shares for taxation in the ratio of forty per cent. of the full actual
value of said shares, and your orator represents that the assessment of
real and personal property at large in said city of Toledo, and county
of Lucas, is uniformly at a rate not more than forty per cent. of the full
actual value of said property, such payment was tendered to said treasurer
without the condition annexed of a receipt in full of payment of
said taxes; nevertheless the said treasurer declines to receive the same,
and your orator has ever since stood ready and offering to pay to the
said William Cummings, treasurer, the said sum of $4,361.60
19 whenever this court should decree that said sum should be received
as payment of the first half of the taxes of 1876 upon the
shares of your orator's capital stock.

Your orator further represents that it is informed, and believes and charges, that the said William Cummings, treasurer, is about to serve your orator with notice, the same as is provided by the laws of Ohio to be served by said treasurer upon banking associations in cases of nonpayment of taxes which have been lawfully assessed upon shares of their capital stock, forbidding the officers of your orator's bank from making any transfer of shares of its capital stock or paying to the holder of any of said shares his dividends upon the same until the said illegal taxes have been first fully paid, and is about further to distrain, attach and otherwise proceed against said shares, and cause the same to be sold under said proceedings as upon execution at law; and your orator further avers that unless restrained by proper order of the court not only will the said William Cummings, treasurer, serve said notice and proceed against said shares, but that unless said methods of taxation are by this court declared illegal and oppressive other valuations of your orator's shares will annually be made under said methods of valuation and other and further notices will be *will be* served upon your orator restraining the payment of dividends and transfer of its shares to purchasers thereof, until said further illegal taxes shall first be fully paid.

And your orator further avers that by reason of the premises your
orator will suffer a multiplicity of suits from said shareholders for its
refusal to pay said dividends or to transfer said shares, and will
20 thereby be mulcted in excessive costs and damages, and will
suffer in its credit and business irreparable injury; and, moreover,
that said illegal and oppressive mode of valuation of your orator's shares
and of the shares of other banking institutions have already damaged
the property and business of your orator more than five thousand dollars.
Unless such methods of valuation be declared illegal by this court,
and your orator declared entitled to the assessment of its shares in a
manner uniform with the assessment of other real and personal property
in said city, county and State, your orator will annually be subjected
to multiplicity of suits as above set forth, and will have funds in
its possession arising from its dividends or otherwise belonging to its
shareholders, distrained upon and seized by the said county treasurer,
and the credit and business of your orator will thereby be ruined; and
your orator is not able to continue in business in the face of the prob-

ability of such methods of taxation and consequent results whereby it suffers and is about to suffer irreparable damage.

Whereupon your orator prays that a further preliminary injunction may issue from this court restraining the said William Cummings, treasurer, from serving notice as such treasurer forbidding the officers of your orator's bank from making transfer of its shares or payment of dividends or other funds belonging to its shareholders until the payment of the taxes on its shares for the year 1876; and that the final order of this court may, as heretofore prayed, declare said taxes illegal and unjust.

OSBORN AND SWAYNE,
Complainants' Solicitors.

21 STATE OF OHIO,
Lucas County, ss:

Be it remembered that on this 17th day of March, A. D. 1876, personally came before me, Edward H. Smith, a notary public in and for the county of Lucas, and State of Ohio, Charles C. Doolittle, who, being by me sworn, says that he is the cashier of the plaintiff in the foregoing supplemental bill of complaint; that he has heard the same read and knows the contents thereof; that all the allegations and statements of facts therein stated as derived from the information of others he believes to be true, and all other allegations and statements therein contained are true in substance and in fact.

CHA'S C. DOOLITTLE.

Sworn to before me and subscribed in my presence this seventeenth day of March, A. D. 1877.

EDWARD H. SMITH,
Notary Public, Lucas County, Ohio.

(Endorsed:) Filed March 19th, 1877. Cha's H. Bill, deputy clerk.

Afterwards, to wit, on the 6th day of March, A. D. 1878, said defendant by his solicitor filed in said clerk's office a motion to vacate injunction in said entitled cause, which said motion is in the words and figures following, to wit:

Motion to vacate.

U. S. circuit court, northern dist. of Ohio. In chancery.

THE MERCHANTS' NATIONAL BANK OF TOLEDO
vs.
WILLIAM CUMMINGS, TREAS'R.

The defendant now comes and moves the court to dissolve the injunction heretofore allowed in said case, for the reason—

1st. That the facts stated in said petition are not sufficient in law to justify the issuing of said injunction.

2d. That the facts stated in said petition as the ground for
22 the relief prayed for therein are not true.

J. K. HAMILTON,
Sol. for Def't.

(Endorsed:) Filed Mar. 6th, 1878. Earl Bill, clerk.

And on the same day, to wit, 6th day of March, A. D. 1878, said defendant by his solicitor filed in said clerk's office a motion to modify injunction in said entitled cause, which said motion is in the words and figures following, to wit:

Motion to modify.

U. S. circuit court, northern district of Ohio. In chancery.

THE MERCHANTS' NATIONAL BANK OF TOLEDO
vs.
WILLIAM CUMMINGS, TREAS.

The defendant now comes and moves the court to so far modify the injunction heretofore allowed in said case as require the plaintiff to pay the defendant the amount of taxes assessed against the shares of its stockholders, on the basis of the valuation of its stock, as made by the auditor of Lucas County for the year 1876, and that said injunction stand only as to the excess over and above said amount.

J. K. HAMILTON,
Sol for Def't.

(Endorsed:) Filed Mar. 6th, 1878. Earl Bill, clerk.

Afterwards, to wit, on the 13th day of March, A. D. 1878, said defendant by his solicitor filed in said clerk's office his supplemental and amended answer in said entitled cause, which said answer is in the words and figures following, to wit:

Supplemental and amended answer.

United States circuit court, northern district of Ohio. In equity.

THE MERCHANTS' NATIONAL BANK OF TOLEDO
vs.
WILLIAM CUMMINGS, TREASURER OF LUCAS County, Ohio.
No. 3254.

23 The defendant, William Cummings, who is sued as treasurer of Lucas County, now comes and by leave of court, first had and obtained, files his amended and supplemental answer to the original and supplemental bill of plaintiff.

Defendant says that the plaintiff ought not to maintain his action for the reason that by the laws of the State of Ohio, wherein the plaintiff is located and doing business, a complete and sufficient remedy is given by which plaintiff could recover from this defendant all taxes collected which are illegally assessed, and that it was the duty of the stockholders owning the shares in plaintiff's bank to have paid, or permitted and caused plaintiff to have paid, the taxes assessed against their shares by the authorities of said State, and then, in case said taxes were illegal, to have brought suit for their recovery, or for the recovery of so much thereof as was illegal, said statute *if* found in vol. of Ohio's laws, page , and this defendant refers to said statutes and makes the same a part of his answer.

Defendant says that by said statute and by the laws of the land the plaintiff has a full, complete, and adequate remedy at law for any wrongs and inquiries done to it by the enforcement of said tax, and that neither the original or supplemental bill of complaint contains

matter whereon this court can ground any decree or grant the relief prayed for by plaintiff. Defendant, further answering, says he admits that after the 20th day of December, 1876, the auditor of Lucas County entered and enumerated upon the duplicate of Lucas County the names of the holders of the shares of the capital stock of the plaintiff's bank, and the shares held by them respectively for taxation as in his
24 answer to original bill admitted, and for the reason therein stated.

He says said shares were listed by deducting from the actual total value of said shares as fixed, determined, and returned by the board of equalization of the values of shares of banks and banking associations of the State of Ohio, the appraised value of the real estate owned by plaintiff as the same stood assessed on the duplicate of Lucas County. After such deduction the remainder of the total value of such shares was entered on the duplicate of the county in the names of the owners thereof in amounts proportioned to the number of shares owned by each as returned on the sworn statement furnished by the bank to said auditor, and the same were charged with taxes at the same rate charged upon the value of other personal property at the city of Toledo, the place where said bank is situated.

Defendant says that the action of the auditor in the premises was a compliance with the provisions of the 5th section of the act of the general assembly of the State of Ohio, passed April 16th, 1876, as found in vol. 64 of the laws of Ohio, page 204, to which reference is hereby made, and which defendant asks may be considered as a part of his answer.

Defendant also says that the action of the county auditor in entering upon the duplicate the tax against the shares of plaintiff's bank in the names of the owners thereof after the 20th day of December was a correction of a clerical mistake, made inadvertently by the auditor of Lucas County at the time the first duplicate was made up.

25 Defendant says such correction was made in accordance with the provisions of the laws of the State of Ohio, and more particularly under the provisions of an act of the general assembly of the State of Ohio, passed January 16, 1873, to be found in vol. 70 of laws of Ohio, page 10, and also an act of the general assembly, passed March 21st, 1874, to be found in laws of Ohio, vol. 71, page 30, to which acts this defendant hereby makes reference.

The defendant denies that said charges were made at a time and in a manner unauthorized by law, or that they were inoperative and create no lien on said shares; on the contrary, he avers that the tax charged against the shares of stock owned by the stockholders in the bank of the plaintiff is legal and such tax is assessed and charged in the manner authorized by the statutes of the State of Ohio, and in all respects legal, constitutional, and valid. He admits the tender as in said supplemental petition alleged, but says that he did not accept the amount so tendered for the reason that he is required by the laws of the State of Ohio, defining his duties, to collect the full amount of the taxes charged on the duplicate against the individuals or property named or described therein each year, and that he is not authorized, but on the contrary he is forbidden to accept from any person any less amount than the full taxes so charged, except that tax-payers have the option of paying said tax in semi-annual installments, viz, one-half on or before the 20th of December of the year for which the tax is assessed, and one-half on or before the 20th of June following.

Defendant says that the amount tendered by the plaintiff in
26 payment of the tax assessed against the shares of stock owned

by its stockholders was much less] than one-half the total of the tax charged to them on the duplicate, and that he had no right to accept the amount so by the plaintiff tendered, but on the contrary would have violated his official oath and the duty enjoined on him by the law had he accepted the *the* money so tendered him by plaintiff.

Defendant denies that the assessment of real and personal property at large in city of Toledo and county of Lucas is uniformly at the rate of not more than forty per cent. of the full value of said property.

Defendant denies that plaintiff has been threatened with suit, or that it is liable to a multiplicity of suits by its shareholders on account of a refusal to pay dividends or make transfers of stock. He denies that the plaintiff will be mulcted in excessive costs and damages, or that it will suffer in its credit or business irreparable injury. He denies that the mode of valuation prescribed by the laws of the State of Ohio, and followed out as regards the plaintiff's shares, have already damaged the property and business of said bank more than five thousand dollars, or that it has damaged it in any sum.

He denies that the plaintiff will be annually subjected to a multiplicity of suits, or that the credit and business of plaintiff will thereby be ruined. He denies that the plaintiff is not able to continue in business in face of the probability of the continuance of the present methods of taxation of its shares. He denies that the plaintiff is about to receive irreparable injury and damage.

Defendant further says that by the 12th article of the constitu-
27 tion referred to in complainant's bill, the general assembly is re-
quired to pass laws taxing, by a uniform rate, according to its true value in money, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property. The general assembly of the State of Ohio has at various times enacted laws for the valuation and taxation of all property within the State at its true value in money.

The defendant further says that by the 3d section of the 12th article of the constitution of the State of Ohio it was further provided and made the duty of the legislature of the State especially to pass laws for the taxation of banks and bankers, to this end, that all property employed in the business of banking bear a burden of taxation equal that imposed on the property of individuals. He says that at various times and dates the general assembly has passed laws for the valuation and taxation of banks and bankers, to the end that all property employed therein should, like the property and monied capital of individual citizens, be valued and taxed at its true value in money; that after the establishment of the national banking system, and after various banking associations had been organized and established in the State of Ohio, the legislature of the State of Ohio on the 16th day of April, 1867, passed an act to provide for the taxation of bank shares and bankers, under and by virtue of the provisions of which act, from that date until the year 1876, shares in national banking associations and the plaintiff's bank from the time of its organization were taxed.

Defendant says that subsequently, viz, on the 12th of April, 1876, for
the more effectual carrying out of the provisions of the constitu-
28 tion of the State above referred to, some provisions of said act of
April 16, 1867, were amended by the act complained of in plaintiff's original bill and other provisions enacted for the purpose of more effectually listing and taxing the shares of banks at their true value in money. Under these two acts, thus passed, the shares of stock in plaintiff's banking association as well as all other banks and banking associa-

tions were valued and taxed. These laws are general in their character and have a uniform operation throughout the State, and in passage of said laws for the valuation and taxation of shares in banking associations and banks, the legislature of the State neither contravened the laws of Congress nor the constitution of the State of Ohio, but, on the contrary, its acts were in accordance with the constitution of the State and within the scope and operation of said act of Congress.

Defendant says, by the first section of said act of April 16, 1867, it is provided that all shares of the stockholders of any bank or banking association located in this State, whether now or hereafter incorporated or organized under the laws of this State or of the United States, shall be listed at their true value in money and taxed in the city, ward, or town where such bank is located and not elsewhere, and by the 1st section of said act of April 12, 1876, it is further provided that each bank or banking association located in this State, by its proper officer, shall, on or before the second Monday in May, annually, make out and return to the auditor of the State under oath, exhibiting in detail, and
29 under appropriate heads, the resources and liabilities of such bank or banking association at the close of business on the first Wednesday after the first Monday of May preceding such report, and also to furnish to the auditor of the proper count in which such bank or banking association is located a duplicate of such report, together with the full statement of the names and residence of the stockholders therein and of the numbers of shares held by each and the par value of each share. On the basis of the statements thus furnished, the true value in money of the shares of stock in the banks and banking associations are ascertained, determined, and equalized for taxation, and the same are required to be placed on the duplicate for taxation on a valuation made by deducting from the total value of such shares, so ascertained, the assessed value of the real estate owned by such bank or banking association and entering the remainder thereof on the duplicate of the county in the names of the owners in amounts proportioned to the number of shares owned by each as returned on the said sworn statement.

The defendant, further answering, says that on or before the second Monday of May, 1876, the plaintiff's banking association did by its proper authorities make out and return to the auditor of State a report exhibiting in detail and under appropriate heads the resources and liabilities of said association, and also furnished to the auditor of Lucas County a duplicate thereof, together with a statement of the residences and names of all the stockholders of said plaintiff's banking association and the number of shares held by each and the par value thereof, a copy of which statement so furnished to the auditor of State is
30 hereto annexed marked Exhibit A, and made a part of this answer.

The auditor thereupon fixed the valuation of stock of said plaintiff's association as he was required to do, and determined the same to be $62\frac{16}{100}$ per cent. of the par value of such stock, as he did also fix and determine the respective values of the stock of all other banks and banking associations located in the county of Lucas, after which he made out and transmitted to the auditor of State a copy of the statement made and returned to him for the year 1876 by the president and cashier of plaintiff's association, together with the valuation of such shares for taxation as determined by said county auditor. The auditor of State with the treasurer of State, and attorney-general, comprising the board of equalization, did proceed as the law required to equalize the valuation of such shares, and when the same was completed the auditor of State did certify to the auditor of Lucas County the valuation of such shares as determined and equalized by said board, which valuation so made was at the rate of 100 dollars per share.

Thereupon the auditor of said county, under the belief that from this valuation, so fixed by said board and so certified to him, there should be deducted from the total value thereof the amount of the value of the real estate of said banking association as assessed on his duplicate for taxation, did deduct the same, which amounted to two and $\frac{60}{100}$ per cent. of the total value of such shares, and entered on his duplicate the value of the shares in plaintiff's banking association at the rate of ninety-seven and $\frac{40}{100}$ dollars per share, being two and $\frac{60}{100}$ dollars less than the valuation of such shares as fixed and determined by said State
31 board of equalization aforesaid and certified to him by the auditor
of State aforesaid, except that, as aforesaid stated, by an inadvertance, mistake, and clerical error, the said stock was not placed on the duplicate when the same was first made up in the names of the stockholders, but in the aggregate as against the plaintiff's banking association. The aggregate valuation thus placed on the duplicate was four hundred and eighty-six thousand eight hundred dollars. The clerical mistake listing said stock in the name of the wrong party, if it was a mistake, was afterward as aforesaid stated corrected.

The defendant submits that the error, if the same was an error, in deducting the assessed valuation of real estate owned by plaintiff from the total valuation of the shares, was not such an error as the plaintiff or the shareholders in its bank could complain of, for the reason that the same did not injure the plaintiff or its shareholders, but, on the contrary, enured to their benefit by making the tax against their shares less than it otherwise would have been.

The defendant also submits that the plaintiff or its stockholders have no right to complain at the correction of the mistake in the listing of the shares in its bank; that the tax assessed against said shares was a lien thereon by the statutes of the State of Ohio from the first Monday in May of the year 1876, and said lien never was removed therefrom; and the change in the listing of said stock was made by the auditor of Lucas County in compliance with the duty enjoined upon him by law, and for the purpose of performing the duties imposed upon him by
32 law in listing for taxation the property subject thereto. And the
defendant in seeking to collect the tax complained of was only acting in his official capacity and performing his sworn duty in collecting the revenues he was required to collect for the use and benefit of the public and the governmental authorities. The defendant says that the tax assessed against the shares of plaintiff's bank was upon the same rate of taxation as was assessed for the year 1876 upon the monied capital of individual citizens of the State of Ohio residents of said county of Lucas, as well as upon all the property in said county subject to taxation.

The defendant says the valuation placed upon the shares of stock in plaintiff's banking association is not in excess of the true value in money thereof, and the same are not taxed upon any valuation in excess of their true value in money, and the same tax, and not otherwise, as is assessed upon the monied capital of individual citizens and all property in said county subject to taxation.

The defendant, further answering, denies that since the duplicate for taxation in Lucas County for the year 1876 was by the auditor of Lucas County delivered to the treasurer of said county as required by law, the officers of said county have caused the said duplicate to be altered and amended by the insertion of an additional tax of two mills against the plaintiff or the shares of its banking association for interest on certain bonds issued by the city of Toledo in aid of the construction of water-works. The defendant says that tax assessed for such purpose 33 was levied and assessed by the proper officers at the proper time.

Defendant says it is not true that said tax was unauthorized and forbidden by the laws of the State of Ohio; on the contrary, it says that said tax as well as all the taxes levied and assessed against the shares of stock or real estate of the plaintiff are legal, constitutional, and valid.

Defendant prays to be dismissed herein with costs.

J. K. HAMILTON,
Solicitor for Defendant, William Cummings, Treas.

STATE OF OHIO,
Lucas County, ss:

William Cummings, being duly sworn, says that the statements in his foregoing supplemental and amended answer contained are true, as he verily believes.

WM. CUMMINGS,
Treas. L. Co.

Sworn to and subscribed before me this 11th day of March, 1878.

J. C. BROWN,
Notary Public, Lucas County, Ohio.

EXHIBIT A.

Statement of the condition of the Merchants' National Bank of Toledo, O., May 3d, 1876, at close of business.

[RESOURCES.

Loans and discounts	**$807,881 50**
U. S. bonds	**200,000 00**
Premiums	**20,000 00**
Due from treas'r of 5 p. c. fund	**9,000 00**
" " banks	**38,226 57**
Cash on hand	**67,502 85**
Furniture and fixtures	**3,841 01**
Expenses and taxes	**9,132 71**
	1,155,584 64
Real estate	**13,200 00**
	1,168,784 64

34 LIABILITIES.

Capital stock paid in	**$500,000**
Surplus fund	**22,000**
Undivided profits (dividend to be made in June)	**67,618 90**
Circulation	**179,980 00**
Deposits	**362,276 01**
Due banks	**36,909 73**
	1,168,784 64

I, Charles C. Doolittle, cashier of the Merchants' Nat'l Bank, do solemnly swear that the above is a true statement of the condition of the bank, according to my best knowledge and belief.

(Signed) CHAS. C. DOOLITTLE, *Cash'r.*

Sworn and subscribed before me this 13th day of May, 1876.

[SEAL.] C. F. FRANCE,
Notary Public.

(Endorsed:) Filed by consent of parties March 13th, 1878. Earl Bill, clerk.

Afterwards, to wit, on the 29th day of April, A. D. 1878, in the April term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Martin Welker, district judge, is the following entry, to wit:

Decree.—Journal 9, *page* 363.

This cause came on to be heard at this term, and was argued by counsel, and thereupon, on consideration thereof, it was ordered, adjudged, and decreed as follows:

The complainant, The Merchants' National Bank of Toledo, having paid to the defendant, as treasurer of Lucas County, in pursuance of its tender heretofore made, the sum of nine thousand and thirty-eight and $\frac{72}{100}$ dollars ($9,038.72), the same being forty per cent. of the taxes charged to the shareholders of complainant's bank upon the books
35 of defendant as treasurer, as taxes for the year 1876 upon said shares, the defendant and his successors in office are perpetually enjoined from collecting, or attempting to collect, the residue of the taxes so charged against the shares of complainant's bank for the year 1876, ordered that defendant pay the costs of this action, taxed at $.

Whereupon comes said defendant, by his attorneys, and gives notice of his intention to appeal this cause to the next term of the Supreme Court of the United States; and this court allows such appeal, and fixes the amount of the bond to be given by said defendant at $500.00.

Be it remembered that heretofore, to wit, on the 25th day of March, A. D. 1878, the following certificate of evidence in said entitled cause was filed in said clerk's office, and is in the words and figures following, to wit:

Certificate of evidence.

In the circuit court of the United States for the northern district of Ohio.

THE MERCHANTS' NATIONAL BANK OF TOLEDO, plaintiff,
vs.
WILLIAM CUMMINGS, TREASURER OF LUCAS County, Ohio, defendant.

Stipulation.

It is hereby stipulated that the affidavits herewith attached, prepared for use upon motions in this case, may be read at the hearing thereof as testimony taken upon notice, but subject to exception.

J. K. HAMILTON,
Solicitor for Defendant.
WAGER SWAYNE,
Solicitor for Complainant.

Personally appeared before the undersigned .E. W. Lenderson, who, being duly sworn, deposes and says:

That he was auditor of Lucas County from the first Monday of March, A. D. 1870, to the second Monday of November, A. D. 1874; that the reappraisement of real estate in said Lucas County for taxation under the law for the revaluation of real estate, passed by the general assembly
of Ohio May 8th, 1868 (Ohio's laws, volume , page), was
36 made while held such office of county auditor; that he was
present at a meeting of the real estate assessors of said Lucas
County, elected under the provisions of said law at the October election, A. D. 1869, called by his predecessor, and held at said auditor's office a few days before he assumed the duties of said office; and that the basis agreed upon at said meeting of said assessors for the valuation of real estate for taxation in said county was fixed at four-ninths of the usual selling price of lots and lands, upon the usual terms of payment, viz, one-fourth cash in hand and the balance in the equal annual payments, with interest on deferred payments; said basis of valuation being determined as follows: Considering gold the standard of money value, the value of currency for a series of years preceding 1870 had averaged about two-thirds its nominal value in gold, and that real estate could be purchased for cash in hand for about two-thirds for which it usually sold when only a part of the purchase price was paid down and the balance paid in installments, the assessors commenced their work of fixing the value of real estate for taxation upon such understanding.

Upon the suggestion of several of the assessors of said Lucas County that it was desirable that the officers having in charge the revaluation of real estate in counties adjoining and near said Lucas County should be consulted as to the basis agreed upon by them, and that there should
a consultation between such officers and the assessors of said Lucas
County, which should enable all the assessors of said Lucas
37 County and the counties near us to act with a full understanding
of the views and intentions of such officers, accordingly in the
month of April, A. D. 1870, said auditor of Lucas County invited the auditors of the counties of Fulton, Williams, Defiance, Henry, Paulding, Ottawa, Wood, Sandusky, Seneca, and Van Wert to meet with the assessors of Lucas County, and so many of the assessors of the other counties named as could attend, to meet at the auditor's office of Lucas County. Said meeting was held, and there was a very full attendance of said auditors and assessors.

It was ascertained at said meeting that meetings of the assessors and auditors had been held in each of said counties, and that the basis of valuation for taxation, as compared with the usual selling price of lands and lots, as determined by said assessors in their several meetings, differed, being in some of the counties as low as forty per cent., and in other counties as high as sixty per cent. A second meeting of said assessors of Lucas County was called by said auditor in the month of July or August, 1870, after said assessors had examined the several parcels of land in their respective districts, and had placed valuation upon such lands; but before their labors were completed and final returns made, upon a comparison of valuations at said meeting, it was found that some of the assessors had adhered closely to said four-ninths rule, while other assessors had placed their valuations below that basis, in some cases not over 25 % or 30 % of real value.

The result of a comparison of views of said assessors at said meeting was a further decrease. The assessors who had fixed their values
38 at about four-ninths of the usual selling price made a further reduction, and these assessors who had placed their valuations at twenty-five per cent. to thirty per cent. of the usual selling price increased their valuations, making the average taxable valuation of lands and lots at about thirty-three and one-third per cent. of the usual selling price of such lands and lots, and the final returns of said assessors were made at about one third of the amount for which lands and lots similarly situated might be purchased on time or deferred payments.

Affiant further says that the boards of equalization provided for by said law passed May 8th, 1868, to wit, the county board, consisting of the county auditor and county commissioners, and the board of equalization of the city of Toledo, consisting of six members elected by the city council of said city and the county auditor, held a joint meeting at the office of said creditor previous to their separate meetings for the performance of their duties, and at said joint meeting it was decided to equalize the value of the real estate of said Lucas County, and of said city of Toledo, as nearly as may be, upon a basis of one-third of the usual selling values of said real estate, and affiant further says that such equalization was so made by said boards upon such basis.

Affiant further says that as auditor of said county he returned the aggregate valuations of real estate in said Lucas County and the city of Toledo as equalized by said county and city boards of equalization to the auditor of State for equalization by the State board of equalization, and that he was ordered by said auditor of State, as the
39 result reached by said State board, to reduce the valuations as
equalized by said county and city boards of equalization three and two-tenths per cent. Affiant further says that the annual boards of equalization, during the years 1871, 1872, 1873, and 1874, of which by virtue of his said office of auditor he was a member, have reorganized the same basis of taxable values, generally fixing the valuation of new structures for taxation at one-third of their cost, and determining the valuation of personal property as nearly as may be at one-third of its actual value.

Affiant further says that he is informed and believes that said boards of equalization for the years 1875 and 1876 have acted upon the same basis of valuations. Affiant further says that as such auditor he had frequent intercourse with the taxing officers of other counties adjoining and near said Lucas County, and well knows that for several years last past and to this day the real and personal property in said counties is assessed at not more than one-fourth to one-half its actual value.

Affiant further says that during his term as auditor he was and still is familiar with the assessments of the shares of the national banks in the city of Toledo. and from his position and experience well knows that said shares of said national banks have uniformly been valued by the board of equalization of said city of Toledo at a higher rate than other real and personal property of the same actual value was assessed in said city by said board, and that the valuation of the shares of said national banks for the year 1876, fixed by the auditor of said county of Lucas prior to the increase made in such valuation by the
40 State board for the equalization of bank shares, &c., was already

in excess of the average valuation of real and personal property of said city of Toledo of the same actual value.

E. W. LENDERSON.

Sworn to before me and subscribed in my presence this 9th day of December, A. D. 1876.

ALBION E. LANG,
Notary Public in and for Lucas County, Ohio.

STATE OF OHIO,
Lucas County, *ss :*

Before me, the subscriber, a notary public within and for the county of Lucas and State of Ohio, personally appeared Wilson W. Griffith, who, being duly sworn, says that he is now and for many years has been a resident of the city of Toledo, in said county, and has been and still is a large owner of both real and personal property in said city. Affiant further says that as the owner of such property he has been constantly familiar with the average ratio which the assessment of real and personal property for taxation in said city has borne to the actual value of the property assessed.

Affiant further says that the rule of assessment of real and personal property in the city of Toledo, as observed by the different ward assessors in said city, and further recognized by the city board of equalization, and also by the county board of equalization, so far as know' to affiant, has been and still is that the real and personal property of said city should be assessed at one-third the actual value of said property in each instance, as nearly as the same could be determined by the
officers above mentioned, and that the average valuation of said
41 real and personal property in the city of Toledo as now shown by
the books of the auditor and treasurer of said county, and as made the basis on which taxes for the year 1876 and for a number of years past have been levied on said property, is in point of fact, as affiant believes, not over twenty-five per cent. of the actual and recognized value of such property. Affiant further says that he is president of the Merchants' National Bank of the city of Toledo, and has been such from its organization; that as such president he is familiar with the actual value of the shares of said bank, and that the valuation of said shares as fixed by the auditor of said county for the year 1876 was largely in excess of the average valuation of real and personal property of equal value in said city of Toledo as fixed by the city board of equalization for this year.

Affiant further says, that the increase in the valuation of said shares, certified by the State board for the equalization of bank shares, &c., to the said county auditor for the year 1876, has raised the valuation of said shares to more than three times the average valuation of real and personal property in said city, of the same actual value.

Affiant further says, that by reason of the low valuation put upon real and personal property in the city of Toledo, as above set forth, the rate of taxation in said city has come to be more than double what the same would be if all the property in said city had been taxed at its actual value, or in the same ratio to its actual value as the shares of said banks have been taxed; and that said rate of taxation for this year is four and $\frac{64}{100}$ per cent. upon the assessed value of property in said city;
that the valuation of the shares of said bank, as certified by said
42 board, is equal to the par value of said shares, making the taxa-
tion proposed to be levied on said bank in the city of Toledo equal

to four and $\frac{64}{100}$ per cent. annually upon its capital; that the capital of said bank represents its entire resources and actual value, except a small accumulated surplus provided against contingent losses from investments already made by said bank; that said bank is possessed of considerable real estate, and that after deducting said real estate from the resources of said bank, and making proper allowance for the contingent losses above mentioned, the shares of said bank are taxed at their full actual value, and that the taxation of four and $\frac{64}{100}$ per cent., as above set forth, upon the capital stock of said bank is prohibitory, and, if enforced, will reduce the actual value of said shares largely below the valuation put upon them by said board.

Affiant further says, that there are individual bankers in the city of Toledo whose exhibit of resources is by law required to be made at the same time and in the same manner as the return of the resources of this bank and of other corporate banks in said city; that the returns of said individual bankers are annually submitted to the board of equalization of real and personal property in said city, and are by said board valued in the same proportion to their actual value as other real and personal property is valued; and that the same has occurred this year; and thereby the taxation proposed to be collected from this plaintiff for the
year 1876 is at more than three times the rate in proportion to the
43 capital employed, to that which has been levied and is about to
be collected upon the moneyed capital of the individual citizens above mentioned, whereby this bank is placed at a ruinous disadvantage in its business, as compared with the said individual bankers.

Affiant further says, that he has personally inspected the duplicate which has been delivered to the treasurer of said county by the auditor of said county, and upon which are entered the taxes to be collected by said treasurer for the year 1876, and that no taxes are entered, assessed, or charged upon said duplicates against the shares of the said Merchants' National Bank, as such, or against any person as the holder of any of said shares; but that the sum of five hundred thousand dollars is charged upon said duplicates in gross against said Merchants' National Bank, as a corporate entity, and not otherwise, as the valuation for taxation of said bank.

Affiant further states that he was a member and president of the city board of equalization for the city of Toledo, in the year 1870, and of the decennial board for the equalization of real property in the county of Lucas for the same year, and that each of said boards found that, in pursuance of custom, which affiant was informed and believes, and to a certain extent knows, to be of long standing and universal prevalence in the county of Lucas, and at other places known to affiant in the State of Ohio, the assessors of real and personal property in the said county have uniformly returned assessments of said property at what they claimed to be uniformly one-third of its actual value, but that said boards
found that said assessments were, in fact, uniformly less than one-
44 third the actual value of said property, and, thereupon, each of
said boards proceeded to equalize the real and personal property in said city and county, the result of which was, in the judgment of affiant, and of all the members of said boards, as expressed to affiant, not more than one-third its actual value as aforesaid.

Affiant is furthermore informed and believes, and so charges the fact to be, that both city and county boards of equalization in said counties have continuously since the year 1870 found the returns of assessments of real and personal property in Lucas County to have been made in the same ratio to the actual value of said property, to wit, one-third thereof;

and that said boards have proceeded to equalize the assessments of said property upon that basis, except that a large proportion of the real property in said county, and in or adjoining the city of Toledo, which, in 1870, was assessed at one-third of its then actual value, has since greatly increased in value; yet, the assessments of said property, made in the year 1870, have been left generally undisturbed.

W. W. GRIFFITH.

Subscribed in my presence and sworn to before me this 11th day of December, A. D. 1876.

EDWARD H. SMITH,
Notary Public, Lucas County, Ohio.

Personally appeared before me the undersigned F. V. McMaken, who, being duly sworn, deposes and says, that he was assessor of the second ward of the city of Toledo, Lucas County, Ohio, for the year 1876; that he was duly elected to said office at the April election, A. D. 1876; that he was duly qualified, and performed the duties pertaining to said office.

Affiant further says, that soon after said election a meeting of
45 the assessors of Lucas County, including the assessor of the city
of Toledo, was held at the office of the auditor of Lucas County, Ohio, having been called by said auditor, and at said meeting it was determined by said assessors to value personal property, except money, at one-third of its actual value; to value new structures at one-third of their cost, and to assess money for taxation at six-tenths of the amount.

Affiant further says that in the performance of his said duties as such assessor he listed and returned for taxation personal property, except money, at one third of its actual value, as nearly as he could determine, money at six-tenths of the amount, and new structures at one-third of their cost, when he could ascertain such cost, and when unable to obtain the exact cost, at one-third of the estimated cost.

E. V. McMAKEN.

Sworn to before me and subscribed in my presence this   day of December, A. D. 1876.

E. W. LENDERSON,
Notary Public in and for Lucas County, Ohio.

Personally appeared before me the undersigned J. M. Weier, who, being duly sworn, deposes and says that he was assessor of the third ward of the city of Toledo, Lucas County, Ohio, for the year 1876; that he was duly elected to said office at the April election, A. D. 1876; that he was duly qualified, and performed the duties pertaining to said office.

Affiant further says that soon after said election a meeting of the assessors of Lucas County, including the assessors of the city of Toledo, was held at the office of the auditor of Lucas County, Ohio, having been called by said auditor, and at said meeting it was determined by said
assessors to value personal property, except money, at one-third
46 of its actual value, to value new structures at one-third of their
cost, and to assess money for taxation at six-tenths of the amou't.

Affiant further says that in the performance of his said duties as such assessor he listed and returned for taxation personal property, except money, at one-third of its actual value, as nearly as he could determine, money at six-tenths of the amou't, and new struct*ers* at one-third of their cost, when he could ascertain such cost, and when unable to obtain the exact cost, at one-third of the estimated cost.

JACOB M. WEIER.

Sworn to before me and subscribed in my presence this 11th day of December, A. D. 1876.

E. W. LENDERSON,
Notary Public in and for Lucas County, Ohio.

Personally appeared before me the undersigned Gottlieb Scherlitz, who, being duly sworn, deposes and says that he was assessor of the fourth ward of the city of Toledo, Ohio, for the year, 1876; that he was duly elected to said office at the April election, A. D. 1876; that he was duly qualified, and performed the duties pertaining to said office.

Affiant further says that soon after said election a meeting of the assessors of Lucas County, including the assessors of the city of Toledo, was held at the office of the auditor of Lucas County, Ohio, having been called by said auditor, and at said meeting it was determined by said assessors to value personal property, except money, at one-third of its actual value, to value new buildings for taxation at one-third of their cost, and to assess money for taxation at six-tenths of the amount.

Affiant further says that in the performance of his said duties as such
assessor he listed and returned for taxation personal property,
47 except money, at as nearly one third of its actual value as he
could determine, money at six-tenths of the amount, and new
structures at one-third of their cost, when he could ascertain such cost,
and when unable to obtain the exact cost, at one third of the estimated
cost.

Affiant further says that he was assessor of said fourth ward of Toledo for the years 1874 and 1875, and that the basis of taxation for personal property, except money, new structures, and money, was substantially the same in each of said years.

GOTTLIEB SCHERLITZ.

Sworn to before me and subscribed in my presence this 12th day of December, A. D. 1876.

E. W. LENDERSON,
Notary Public in and for Lucas County, Ohio.

Personally appeared before me the undersigned August Kreise, who, being duly sworn, deposes and says that he was assessor of the fifth ward of the city of Toledo, Lucas County, Ohio, for the year 1876; that he was duly elected to said office at the April election, A. D. 1876; that he was duly qualified, and performed the duties pertaining to said office.

Affiant further says that soon after said election a meeting of the assessors of Lucas County, including the assessors of the city of Toledo, was held at the office of the auditor of Lucas County, Ohio, having been called by said auditor, and at said meeting it was determined by said assessors to value personal property, except money, at one-third of its actual value, to value new struct*ers* at one-third of their cost, and to assess money for taxation at six-tenths of the amount.

Affiant further says that in the performance of his said duties as such
assessor he listed and returned for taxation personal property,
48 except money, at one-third of its actual value, as nearly as he
could determine, money at six tenths of the amount, and new
structures at one-third of their cost, when he could ascertain such cost,

and when unable to obtain the exact cost, at one-third of the estimated cost.

AUGUST KRUSE.

Sworn to before me and subscribed in my presence this 11th day of December, A. D. 1876.

E. W. LENDERSON,
Notary Public in and for Lucas County, Ohio.

Personally appeared before me the undersigned Louis Wacker, who, being duly sworn, deposes and says that he was assessor in the seventh ward of Toledo, Lucas County, Ohio, for the year 1876; that he was duly elected to said office at the April election, A. D. 1876; that he was duly qualified, and performed the duties pertaining to said office; that soon after said election a meeting of the assessors of Lucas County, including the assessors of the city of Toledo, was held at the office of the auditor of Lucas County, having been called by said auditor, and at said meeting it was determined by said assessors to value personal property, except money, at one-third of its actual value, to value new buildings for taxation at one-third of their cost, and to assess money for taxation at six-tenths of the amount.

Affiant further says that in the performance of his said duties as such assessor he listed and returned for taxation personal property, except money, at as near one-third of its actual value as he could determine,
money at six-tenths of its amount, and new structures at one-
49 third of their cost, when he could ascertain the same, and, when
unable to ascertain the exact cost, at one-third of their estimated
cost.

LOUIS WACKER.

Sworn to before me and subscribed in my presence this 9th day of December, A. D. 1875.

E. W. LENDERSON,
Notary Public in and for Lucus County, O.

Personally appeared before me the undersigned D. W. H. Howard, who being duly sworn, deposes and says, that he was a member of the State board for the equalization of the real estate of the State of Ohio for the years 1875 and 1871; that he was duly elected to said office at the October election, A. D. 1870; that he was duly qualified and performed the duties of said office; that the sessions of said State board of equalization were held at the city of Columbus in the winter of 1870 and 1871, and that in the performance of its duties said State board equalized the valuations of all the real property of the State of Ohio, by increasing or decreasing the aggregate valuations of the several counties and cities as the same had been equalized by the several county and city boards of equalization, but without materially changing the amount of the total aggregate as the same had been equalized by the several county and city boards of equalization.

**Affiant further says that when all of said real estate of the State of Ohio had been equalized as between the several counties and cities of the State by additions or reductions as were found necessary by said State board, but without materially changing aggregate valuation as returned
to them, it was found by said State board of equalization that the
50 aggregate value of the real estate of Ohio as so equalized them
was above the real value in money for purposes of taxation, and
they reduced said aggregate valuation of all the real estate of Ohio twelve per cent.**

Affiant further says that he believes and it was generally understood by the members of said State board of equalization that the real value of said real estate as equalized by said State board of equalization, but before said reduction of twelve per cent. of the total amount, was about fifty-five to sixty per cent. of the prices for which said real estate could be sold, and that after said reduction of twelve per cent. the valuation of the real property of Ohio for purposes of taxation, so fixed by said State board of equalization, averaged about one-half of the amount for which it might be sold, or what might be considered the usual selling price of said real estate for cash.

D. W. H. HOWARD.

Sworn to before me and subscribed in my presence this 14th day of December, 1876.

E. W. LENDERSON,
Notary Public in and for Lucas County, Ohio.

Personally appeared before me the undersigned, Theodore Williams, who, being duly sworn, deposes and says that at the October election, A. D. 1870, he was elected to the office of member of the State board of equalization of real estate for the State of Ohio; that he was duly qualified and performed the duties of such office; that the real estate of the State of Ohio was assessed or revalued for taxation, and equalized
by boards of equalization in the several counties and cities of the
51 State in the year 1870; that said valuations as equalized by said
county and city boards of equalization were compared by said State board of equalization, and equalized by increasing the aggregate valuations in some counties and cities, and by reducing the aggregate valuations in other counties and cities, but without materially changing the total aggregate valuation of real estate for purposes of taxation in the State.

Affiant further states that after the equalization by said State board as above the entire aggregate valuation of the real estate of the State was reduced by deducting twelve per cent. of such aggregate valuation and that the balance of eighty-eight per cent. constitutes the taxable valuation of real estate upon which taxes for the State, county, school, city, and township purposes have been levied and collected since and including 1871.

Affiant further states that he well knows that the real value of the real estate of the State of Ohio, or the price for which said real estate would readily sell for money, is much above the valuation as fixed for purposes of taxation by said State board of equalization and that in the opinion of said affiant such taxable valuation does not exceed sixty per cent. of the value for which the real estate of the State would readily sell for money.

THEODORE WILLIAMS.

Sworn to before me and subscribed in my presence this 15th day of February, A. D. 1877.

WM. P. WOOLMTOW,
Notary Public in and for Huron County Ohio.

52 In the circuit court of the United States for the northern district of Ohio. In equity.

MERCHANTS' NATIONAL BANK OF TOLEDO, complainant,
against
WILLIAM CUMMINGS, TREASURER OF LUCAS County, respondent.

Charles C. Doolittle, being duly sworn, says that he is and for five years has been the cashier of the Merchants' National Bank of Toledo; that the paper hereto annexed, marked "A," was served upon said bank by the signers thereof prior to the commencement of this suit now pending in the circuit court of the United States for the northern district of Ohio, to enjoin the collection of taxes assessed upon said bank for the year 1876; that the signatures to said paper are genuine, and that the signers were at that time all of them shareholders in said bank in the aggregate to a very large amount, to wit, nearly or quite one hundred thousand dollars.

Affiant further says that said bank had at time of the filing of said bill and supplemental bill nearly one hundred and forty stockholders, and that so far as known to affiant none of said stockholders had expressed any willingness or consent that said bank should pay the taxes referred to in said exhibit, but all of said stockholders who were cognizant of the mode of assessment of their shares in that year for taxation regarded said taxes as illegal and unjust.

53 Affiant further says that the assessment of said shares for taxation in the year 1876 was fully equal to the usual selling price thereof, and fully equal to the true value in money of said shares as commonly understood, whereas other property in said city and county and, so far as affiant knows, in the State at large, is uniformly assessed for taxation at much less than the usual selling price thereof, or true value in money as commonly understood, and as affiant believes at an average of not more than forty per cent. of the usual selling price or the value in money of such property.

Affiant further states upon information and belief that the result of the action of said State board of equalization upon the assessment of the shares of said bank was an increase in the assessment of the same for taxation over the assessment of the same for the previous years of seventy-four per cent., while the increase in the assessment of other property at large in the city of Toledo was, for real property, one and three-tenths ($1\frac{3}{10}$) per cent., and for personal, six per cent. Yet affiant knows that no material increase in value of said shares had taken place during said year, nor was any evidence before said board tending to show any material change whatever in the value of said shares.

Affiant further says that the damage with said bank is threatened by reason of the matters and things complained of in its original and supplemental bill filed in this action greatly exceed the sum of five thousand dollars.

CHAS. C. DOOLITTLE.

54 Sworn to and subscribed before me this 21st day of March, A. D. 1878.

JOHN R. OSBORN,
U. S. Com'r, Northern Dist. Ohio.

And afterwards, to wit, on the 5th day of June, A. D. 1878, said defendants filed their bond in appeal in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

THE MERCHANTS' NATIONAL BANK OF TOLEDO
against
WILLIAM CUMMINGS, TREASURER OF LUCAS COUNTY.

Know all men by these presents that we, William Cummings, J. K. Hamilton, and William C. Cheney, of Toledo, Ohio, are held and firmly bound unto the Merchants' National Bank of Toledo, Ohio, in the sum of five hundred dollars, to be paid to the said Merchants' National Bank, its successors and assigns, to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, dated this 25th day of May, A. D. 1878. Whereas the above-named William Cummings has taken an appeal to the Supreme Court of the United States to reverse the decree rendered in above-entitled action by the circuit court of the United States for the northern district of Ohio: Now, therefore, the condition of this obligation is such that if the above-named William Cummings shall prosecute his said appeal to effect, and answer all costs and damages if he
55 shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

W. CUMMINGS. [SEAL.]
J. K. HAMILTON. [SEAL.]
W. C. CHENEY. [SEAL.]

Sealed and signed in my presence this 25th of May, 1878.
J. D. FORD.

We regard the foregoing bond as satisfactory, June 4th, 1878.
OSBORN AND SWAYNE,
Pl'ff's Sol's.

(Endorsed:) Filed and approved June 5th, 1878. A. J. Ricks, clerk.

56 Circuit court of the United States for the northern district of Ohio.

THE MERCHANTS' NATIONAL BANK OF TOLEDO, Ohio,
v.
WILLIAM CUMMINGS, TREASURER, &c.

There were several points presented and urged in the argument of this case on the hearing, which, in the view I have taken of it, need not be discussed here.

Suffice it to say that from the pleadings and proofs it very satisfactorily appears that complainant's capital stock was assessed for taxes for the year 1876 at its full value, while all other property in the same city was assessed at from 30 to 40 per cent. only of its real value, and that by reason of this unequal assessment complainant's capital stock was, in the hands of its shareholders, over'ated with an undue proportion of the public taxes.

It is not important to enquire into the methods leading to such a result; whether from inadvert*a*nce or design, the consequences are the same to the complainant. It is an injustice that contravenes the constitution of Ohio as well as the provisions of the national banking law, and a wrong which the courts may, when their powers are properly invoked, take cognizance of and redress.

But the def't insists that the wrong complained of is a wrong to complainant's shareholders against whom the tax was assessed, and not
against the complainant. This objection seemed, on first impres-
57 sion, to have been well taken, but further reflection induces the
belief that it involves the rights of complainant as well as the
rights of its corporators. Between the two there is an intimate connection: the legal entity, the corporation, is distinct from its shareholders, but the former is a trustee for the latter and custodian of the corporate funds, and if it shall pay the taxes so assessed and assume to deduct the *the* same from dividends declared, or to be hereafter declared, in favor of its shareholders, it may, and the averment is that it will, subject its self to a multiplicity of suits with its own stockholders; whereas if it refuses to pay these taxes it will impair its credit, embarrass its business, and expose itself to vexatious and expensive suits, and entail upon its self other and irrem*i*diable injuries in resisting the illegal exactions made upon it.

Hence, in view of the probable consequences, I have reached the conclusion that the complainant, in its corporate capacity, is entitled to a standing in this court and to relief, and I shall therefore authorize a decree permitting complainant to pay to the def't or into the registry of the court 40 per cent. of the amount of the tax assessed against its shareholders in accordance with its tender heretofore made, and on this being done, that an injunction be issued perpetually enjoining the collection of the residue thereof.

The costs will be decreed against def't, to be paid out of the money to be realized under the decree hereinbefore authorized.

April 4th, 1878.

JNO. BAXTER, *Judge.*

58 THE UNITED STATES OF AMERICA,
Northern District of Ohio:

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court, in the cause wherein the Merchants' National Bank of Toledo is the complainant, and William Cummings, treasurer of Lucas County, Ohio, is the defendant, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Cleveland, in said district, this seventh day of October, A. D. 1878, and of our Independence the 103 year.

[SEAL.] AUGUSTUS J. RICKS,
Clerk.

(Indorsement on cover:) No. 563. William Cummings, treasurer of Lucas County, appellant, vs. The Merchants' National Bank of Toledo. N. Ohio C. C. U. S. Filed 15th October, 1878.

THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1879.

WILLIAM CUMMINGS,

Treasurer of Lucas County, Ohio, Appellant,

AGAINST

THE MERCHANTS NATIONAL BANK,

OF TOLEDO, OHIO.

BRIEF FOR APPELLANT.

HAMILTON & FORD.

For the Appellant

Blade Printing & Paper Co., Toledo, O.

In the Supreme Court of the United States

WILLIAM CUMMINGS, TREASURER OF LUCAS COUNTY,
Appellant,

VS.

THE MERCHANTS' NATIONAL BANK OF TOLEDO,
Appellee.

THE CASE STATED.

This cause is in this Court on appeal from the decision of the United States Circuit Court for the Northern District of Ohio.

The matter involved is the tax levied and assessed by the authorities of the State of Ohio upon five hundred shares of the capital stock of the Merchants National Bank of Toledo Ohio, (being the entire stock of said bank) for the year 1876.

The amount of the tax so levied and assessed, and which it became the duty of appellant, as Treasurer, to collect, was twenty-two thousand five hundred and eighty-seven dollars and seventy cents, ($22,587.70.)

The court below decreed a perpetual injunction against the collection of sixty per cent. of said tax upon the payment of forty per cent. thereof.

The forty per cent. having been paid, there now remains uncollected the sum of thirteen thousand five hundred and fifty-two dollars and sixty-two cents ($13.552.62.)

To reverse the decree perpetually enjoining the collection of this amount of the revenue by the laws of the State of Ohio, due the State, County, School, Municipal and other public agencies of said State, this appeal is prosecuted.

The laws of the State of Ohio, under which the tax complained of by the Merchants' National Bank was levied and assessed, are as follows:

[Passed and took effect April 16th, 1867.]

Be it enacted by the General Assembly of the State of Ohio, That all the shares of stockholders in any bank or banking association, located in this State, whether now or hereafter incorporated or organized under the laws of this State, or of the United States, shall be listed at their true value in money and taxed in the city, ward or town where such bank is located and not elsewhere.

SECTION I. The real estate of any such bank or banking association shall be taxed in the place where the same may be located, the same as the real estate of individuals.

SEC. III. There shall at all times be kept in the office where the business of such bank or banking association is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which shall be at all times, during business hours, open to the inspection of all officers who are or may be authorized to list or assess the value of such shares for taxation.

SEC. IV. (Repealed.)

SEC. V. The auditor of the County in which any bank or banking association may be located, upon receiving the return provided for in the fourth section of this act, shall deduct from the actual total value of the shares in any bank or banking association the appraised value of the real estate owned by such bank or banking association, as the same stands assessed on the duplicate, and the remainder of the total value of such shares shall be entered on the duplicate of the County, in the names of the owners thereof, in amounts proportioned to the number of shares owned by each, as returned on said sworn statement, and be charged with taxes at the same rate charged upon the value of other personal property at the place where such bank or banking association is located.

Sec. VI. Any taxes assessed on any such shares of stock or the value thereof, in manner aforesaid, shall be and remain a lien on such shares from the first Monday of May, in each year, until such taxes are paid: and, in case of non-payment of such taxes at the time required by law by any shareholder, and after notice received of the County Treasurer of the non-payment of such taxes, it shall be unlawful for the cashier or other officer of such bank or banking association, to transfer, or permit to be transferred, the whole or any portion of said stock, until the delinquent taxes thereon, together with costs and penalties, shall be paid in full, and no dividend shall be paid on any stock so delinquent so long as such taxes, penalties and costs, or any part thereof, remain due and unpaid.

Sec. VII. It shall be lawful for any such bank or banking association to pay to the treasurer of the county in which said bank or banking association may be located, the taxes that may be assessed upon its shares aforesaid, in the hands of its shareholders respectively, and deduct the same from any dividends that may be due or that thereafter may become due on any such shares, or deduct the same from any funds in its possession belonging to any shareholders as aforesaid.

Sec. VIII. The County Treasurer may enforce the collection of any tax or penalty assessed under this act at any time after the same becomes due by distraint, attachment or other legal proceedings instituted in his name as such treasurer, and, in case of his death, or retirement from office before the collection of such, taxes or penalties, his successor in office may be made party in such proceedings and prosecute the same to final judgment and execution.

Sec. IX. If any bank or banking association shall fail to make out and furnish to the county auditor the statement required by the fourth section of this act, within the time required herein, it shall be the duty of said auditor to examine the books of said bank or banking association; also, to examine any officer or agent thereof, under oath, together with such other persons as he may deem proper, and make out the statement required by said fourth section, and enter the value of said shares on the duplicate for taxation. Any bank officer failing to make out and furnish to the county auditor the statement, or wilfully making a false statement, as required in the fourth section of this act, shall be liable to [a] fine not exceeding one hundred dollars, together with costs and other expenses incurred by the auditor or other proper officer in obtaining such statement aforesaid; and said auditor shall have the same powers, and the probate judge of said county shall exercise the same powers and perform the same duties under this section, as are authorized by law in cases where the county auditor is informed or has reason to believe that any party has failed to make any return, or has made a false return for taxation. —*Vol. 64, Ohio Laws, p. 204. Swan & Saylor Statutes, p. 763.*

An act to provide for the Equalization of the Valuation of Bank Shares for Taxation.

[Passed and took effect April 12, 1876.]

Section I. *Be it enacted by the General Assembly of the State of Ohio,* That it shall be the duty of the Cashier of any bank or banking association located in this State, whether organized or incorporated under the laws of this State or the United States, to make out and return to the Auditor of State on or before the Second Monday of May, annually, a report under oath, exhibiting in detail and under appropriate heads, the resources and liabilities of such bank or banking association at the close of business, on the first Wednesday after the first Monday of May preceding such report, a duplicate to be furnished the county auditor, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share.

Sec. II. It shall be the duty of the auditor of the county in which such bank or banking association is located, immediately after he has determined and assessed the value of the shares of such bank or banking association, for the purpose of taxation, as required by the fifth section of the act entitled, "an act to provide for the taxation of bank shares and bankers," passed April 16, 1867, to make out and transmit to the Auditor of State a copy of the statement made and returned to him for the current year by the president and cashier of such bank or banking association, together with the valuation of such shares for taxation, as determined by such county auditor.

SEC. III. The Auditor of State, Treasurer of State and Attorney General shall constitute a board of equalization of the value of the shares of such banks or banking associations of this State as fixed and determined by the several county auditors of the State, for the purpose of taxation under the provisions of said act. Said board shall meet annually on the third Tuesday of June at the office of the Auditor of State, in Columbus, and shall have power to hear complaints and to equalize the valuation of the shares of such banks or banking associations as fixed and determined by the several county auditors under said act, by adding to the valuation of the shares of any banks or banking associations, as in their opinion are assessed below their value in moneys, or, by reducing the valuation of the shares of any such banks or banking associations as in their opinion have been assessed above their value in money.

SEC. IV. The Auditor of State shall forthwith, after such equalization shall have been made by said board, certify to the auditor of the proper county the valuation of the shares of such bank or banking association, as determined and equalized by said board, and said shares shall thereupon be charged with taxes upon the duplicate at such valuation for said year.

SEC. V. That section four of an act to provide for taxation of bank shares and bankers, passed April 16, 1867, (S. & S., 763,) be and the same is hereby repealed. This act shall take effect and be in force from and after its passage.—*Vol. 73, Laws of Ohio, page 251.*

The provisions of these statutes were strictly and literally complied with in listing and assessing the shares of stock of appellee's bank for taxation for the year 1876.

The capital stock of the bank was five hundred thousand dollars, divided into five thousand shares of one hundred dollars each.

The valuation of these shares, as determined by the County Auditor, in accordance with the act of April 16th, 1867, was $62.10 each — a total valuation of the capital stock of the bank of $310,500.

After making such valuation the County Auditor made out and transmitted to the Auditor of State a copy of the statement made and returned to him for the current year by the President and Cashier of the appellee's banking association, together with the valuation of such shares for taxation, as determined by such County Auditor.

This valuation was changed by the State Board of Equalization to $97.44 per share, a total valuation of $487,200, which valuation was certified by the Auditor of State back to the Auditor of Lucas County, and by him placed upon the grand duplicate of Lucas County for taxation in amounts proportioned to the number of shares owned by each owner, and against such shares were charged taxes at the same rate as upon other personal property in the City of Toledo, the place where said Merchants National Bank is located.

By a clerical mistake or misunderstanding of the proper method of listing the property, the Auditor of the County entered the assessment as against the bank in its corporate capacity, instead of against the stockholders by name.

The bank obtained a preliminary injunction against the

Treasurer of Lucas County, after the duplicate had been placed in his hands for collection.

The original bill of complaint alleged said mistake as one of the grounds of relief, and also as a further ground complained that the valuation of the shares of stock of the Bank, as made by the State Board of Equalization, was in violation of the Constitution of the State of Ohio, as well as in contravention of the provisions of what is known as the National Bank Act. *pp.* 1–4 *of Record.*

Subsequently, under a provision of the tax statutes of Ohio, the duplicate of Lucas County was amended, and the tax upon the bank shares was levied and assessed and placed upon the duplicate as against the individual owners of the shares, and not against the bank.

Thereupon the supplemental bill of complaint set out in the record was filed. *pp.* 9-11 *of Record.*

Upon all the material allegations of the original and supplemental bill issue was joined by the answer. *Record pp.* 6-8. *Record pp.* 12-17.

The evidence which is copied in the record, consisted of a number of affidavits of Ward and Township Assessors, and others, (by consent considered as depositions taken upon notice). This evidence tended to show that the custom in Lucas County of the Ward and Township Assessors, and City and County Boards of Equalization had been, in fixing the valuation of property for taxation, to place it below its real and actual value in money. That real estate, when they had occasion to value it, was generally placed upon the duplicate at about 40 per cent. of its value, and personal property at 40 to 50 per cent.; that this custom prevailed and was practiced in the valuations for Lucas County for the year 1876.

There was no evidence tending to show that any property, where, by the law the valuation is fixed by other than the local Assessors or Boards of Equalization, as aforesaid, was placed on the duplicate below its actual value in money. *Record pp.* 18-27.

THE ERRORS RELIED ON ARE:

1st. That the court below awarded a decree in favor of the appellee.

That decree was erroneous in that it perpetually enjoined the appellant, as Treasurer of Lucas County, from collecting or attempting to collect more than forty per cent. of the taxes charged to the shareholders of the appellee's bank for the year 1876; whereas the decree should have been in favor of the appellant, defendant below, and appellee's bill should have been dismissed.

2d. That the testimony offered by the appellee was admitted and considered against the objection of appellant.

It will be observed that it is conceded by the pleadings that the provisions of the statutes of the State of Ohio in levying this tax were complied with except in the mistake originally made by the Auditor in charging the tax to the bank instead of to the stockholders.

Practically this mistake, as a ground for relief, was waived in the supplemental bill, and we understand it not now to be insisted upon in argument, as it was not insisted upon in the court below.

It may not be improper, however, to consider the point made that the tax is illegal on account of the

I.

ORIGINAL MISTAKE IN LISTING THE TAX AGAINST THE BANK.

We concede that the law in that respect was not complied with when the duplicate was originally made up.

That mistake, however, even uncorrected, would not have been fatal to the assessment. The mere clerical error in writing on the duplicate a wrong name as the owner of the stock could not prevent the State from collecting its revenue. The lien of the State on each share of stock in the bank attached on the first Monday of May and remains until the taxes may be paid. *Section 6 of Laws of* '67, *Supra* p. 3. The tax list was not made up until after the third Tuesday in June, for on that date the State Board by law met to equalize the shares; and not until their session was over could the County Auditor place the shares upon the duplicate. *Laws of* 1876, p. 251, *Supra*, pp. 4-5.

A mistake in placing the shares in the name of the proper owner on the duplicate, or even an omission to place them on the duplicate at all, would not deprive the State of the lien given it by statute.

Again, the bank could not complain that by the mistake it was injured, for if it had paid the taxes as they stood it would only have done what by law it was authorized to do, viz.: pay the taxes assessed against its shares. Vol. 67, O. L., p. 204 § 7. S. & S., p. 763, reads as follows:

"It shall be lawful for any such bank or banking association to pay to the Treasurer of the County in which such bank or banking association may be located, the taxes that may be assessed upon its shares as aforesaid, in the hands of its shareholders respectively, and deduct the same from any dividends that may be due, or may thereafter become due on any such shares, or deduct the same from any fund in its possession belonging to any shareholder."

THE CORRECTION OF THE DUPLICATE.

If such a mistake was made in the original entry of the tax as would authorize the bank to complain, that mistake was afterwards corrected.

The authority to make such correction is found in O. L. vol. 70, p. 10, and O. L. v. 71, p. 30. By the first statute it is made the duty of the Auditor from "time to time to correct all errors which he shall discover on his duplicate, either in the name of the person charged with the taxes or assessments, the description of land or other property, or on the amount of such tax or assessment."

The statute of 1874 provides:

SECTION I. *Be it enacted by the General Assembly of the State of Ohio*, That the Auditor of each County in the State shall keep in his office a book, to be denominated a book of additionals and deductions, and that after the duplicate shall have been delivered to the Treasurer for collection, as required by law, no amendments to, or alterations therein shall be made by any Auditor during the fiscal year.

SEC. II. That when it shall become necessary to add to or increase the amount of the tax or assessment upon any property upon said duplicate, against any person or property, said auditor shall make an entry in said book of additionals and deductions, of the amount of said additional tax or assessment, together with a description of the property and the name of the person to be charged therewith; and said auditor shall thereupon certify to said treasurer the same, who shall, upon receipt of said certificate, proceed to collect such additional tax or assessment in the same manner as other taxes and assessments are now, or may hereafter be collected; and said treasurer in his semi-annual settlements with the auditor, shall be charged with all such additional taxes or assessments, and credited with such as may not be collected by him as in case of other delinquencies.

SEC. III. That whenever it shall become the duty of any auditor, during said fiscal year, to deduct from the duplicate in the possession of the treasurer any tax or assessment, or any part of the same, he shall make an entry of the amount, together with a description of the property and the name of the person or persons charged with said tax or assessment, in the book mentioned in the first section of this act, and immediately certify the same to the treasurer who shall receive said certificate in payment, in whole or in part as the case may be, of said tax or assessment against such property, person or persons, and that, for every certificate so recorded, the treasurer shall be entitled to a credit in his semi-annual settlement with the auditor for the amount thereof, said auditor to be paid for services under this act by order of county commissioners out of the county funds, as for services in similar cases.—*Vol.* 71, *O. L.*, *p.* 30.

The mistake in this case, if it was one, was clearly a mistake in the duplicate. It was corrected by the Auditor as alleged in the answer, and in the manner directed by the statute of 1874, p. 30.

See for construction of a similar statute, Humphreys vs. Safe Deposit Company, 29 Oh. St. R., p. 608.

In this case the assessment had been made and every process completed except the final one of copying into the duplicate the assessment. If that copy had not been made, the tax would have been a lien upon the shares of stock, which could have been enforced whenever the final record was completed. The record was finally completed by charging the tax against the stock in the name of the owners, instead of the name of the bank.

In the case of Champaign County Bank *vs.* Smith, 7 O. R.

St. p. 47, the tax was increased long after the duplicate had been placed in the hands of the Treasurer for collection, and even after a receipt in full had been given.

Judge Cooley, in his work on taxation, says:

"Of the errors that creep into the records of tax proceedings, very many are merely clerical, or occur in consequence of a failure to put in proper form the evidence of transactions in themselves correct. Tax proceedings must stand by the record; and a failure to make the proper record may be as fatal as a failure to take the proceeding of which the record should have been made.

"If, however, the defect in the record is obviously clerical, and nothing more; that is to say, if the record on its face sufficiently shows that the proper steps have in fact been taken, but that there is some error on the part of the recording officer in putting the evidence upon record in precise conformity to the law; some omission of a word, or accidental employment of one word for another, or any similar error which cannot mislead, the mistake may be overlooked, and the court, when the record becomes the subject of judicial investigation, may by intendment supply what is omitted, and correct what is erroneous, and then sustain the record as though the proper corrections had been made by the recording officer himself.—*Cooley on Taxation, p.* 234.

"There are undoubtedly cases in which ministerial officers may correct errors without judicial permission, and there are also some cases in which it would be apparent they could have no such power. Still other cases may be open to reasonable doubt. When the defect consists merely in the failure to copy into a book of records the official document which evidences some legal transactions, the proper recording officer may correct it at any time by making the required record. This may be done by the officer who should have done it in the first place, or it may be done by his successor in office.—*Cooley on Taxation, page* 236.

Of course the amendment could not be made by one who was no longer in office, as under such circumstances it would not be an official act. Neither could it be made under circumstances where it would operate unjustly upon the rights of parties. Thus it has been held in Vermont, that if a tax sale is fatally defective by reason of the failure of the Town Clerk to certify on his record that the advertisements were published as required by law, the clerk cannot make it good by amending his record after the time for redeeming from the sale has expired. The reason is, that the owner, relying upon the record, may have omitted to redeem, inasmuch as his land has not been legally sold. But until the rights of third parties have intervened, or conclusive action has been taken in reliance upon the records or documents, as representing in their imperfect state the actual facts, it is not perceived why a mistake once made should be crystallized and preserved as an instrument for the destruction of all that should follow, instead of being corrected, that legal proceedings may be supported upon it. The question to some extent is one of public policy; and while undoubtedly it is well to hold strictly to the rule, that records shall not be tampered with to the injury of parties concerned, there is no reason, or principle of public policy which should preclude the correction of errors before rights have become fixed, but many considerations which support it.—*Same work, pages* 241 *and* 242.

We cite also the following authorities to show that a mistake such as the one complained of would not invalidate a tax.—*North Ward National Bank of Newark vs. City of Newark* 10 *Broom* 380, where a precisely similar mistake was held not fatal.

National Bank vs. Commonwealth 9 *Wall.* 353.
Lionberger vs. Rouse Ib. 468.
Mills vs. Gleason, 11 *Wisc.*, 470.
Kellogg vs. Oshkosh, 14 *Wisc.*, 623.

A tax levied for a lawful purpose by authorized officers, though in an informal manner, will not be enjoined. 40. *Ill.* 388.

II.

WE CLAIM THAT THE COURT IN THIS CASE HAD NO JURISDICTION.

1st. On the well-known principle which excludes Courts of equity where a remedy exists at law.

The case of *Dows vs. City of Chicago*, 11 *Wallace*, 108, is sufficient authority in this Court on this proposition.

A series of decisions in Missouri directly on the point are also worthy the attention of the Court.

In *1st National B'k vs. Meredith*, 44 *Mo.*, *p.* 500, It is laid down as a principle that "A National Bank is not entitled to an injunction restraining the collection of a tax on its shares of stock on the ground that they are illegally assessed against the bank instead of the shareholders, it not appearing that an action for damages will not afford a complete remedy."

Errors and irregularities which do not avoid the tax, such as a mistake in the name of the supposed owner of the property, do not excuse the collector from a performance of his duty, nor subject him to the penalties of a wrongdoer.

St. Louis vs. Lightner, 47 *Mo.*, 393.
St. Louis vs. Charles, 47 *Mo.*, 462.

"A court of equity will not relieve from payment of a tax though not assessed conformably to a mere *directory* statute where there is no substantial error." This principle was held to apply in a case where the property of the Virginia and Maryland Bridge Company was taxed on the Assessors books as belonging to the Potomac Bridge Company, and the corporation knew of the assessment but neglected to apply to the commissioners for a correction of the error. *O'Neal vs. Virginia*, 18 *Md.*, 1.

A Court of Equity will not interfere when substantial justice is done. 16 *Wisc.*, *p.* 1.

There are reasons of policy founded on necessity of speedy collection of taxes which ought to prevent a Court of Chancery from suspending their collection except on the clearest grounds. *Dodd vs. Hartford*, 35 *Conn.*, 239.

When a tax is assessed as a personal charge against the party taxed, or against the personal property, it is difficult to suggest any ground of equitable jurisdiction. Presumably the remedy at law is adequate.

Cooley on Taxation, *p.* 538.
High on Injunction, § 355 *etc.*

2nd. The law in Ohio. By a series of early decisions in Ohio it was held that Courts of Equity could not grant relief against illegal taxes.

See Mechanics and Traders' Bank vs. Debolt, 1 *Oh. St.*, 591.
Exchange Bank vs. Hines, 3 *Oh. St.*, 1.
Matheny vs. Golden, Treas., 5 *Oh. St.*, 36.
Daniels vs. Stephan, 27 *Oh. St.*, 530.

The courts in Ohio now have jurisdiction only because the Legislature has expressly given them that jurisdiction.

"The Courts of Common Pleas shall have jurisdiction to enjoin the illegal assessment of taxes, and the collection of taxes illegally assessed, and of actions to recover back the amount of such taxes as may have been or shall hereafter be collected, without regard to the amount thereof.

Actions to enjoin the illegal assessment of taxes shall be brought against the County Auditor, and also against any municipal corporation for whose use or benefit the assessment may be made; actions to enjoin the collection of taxes shall be brought against the officer having the collection thereof, and actions to recover back such taxes after the collection thereof, against the officer making the collection, or his legal representatives."—53 *O. L. p.* 178. *Swan & Cr., Stat. p.* 1151.

The Courts of the United States would have afforded a remedy by the ordinary action of trespass against the Treasurer, had the Treasurer enforced the collection of an illegal tax.

The Courts of Ohio, by express provision of statute authorized the bank to pay the tax under protest, and then within a year to bring suit to recover back the amount paid, if illegally assessed.

3rd. Had the court jurisdiction on the ground of prevention of a multiplicity of suits?

Upon this ground alone the court below entertained jurisdiction of the case.

And the case of Dows vs. Chicago, 11 Wallace, is relied upon as sustaining the jurisdiction.

Upon an examination of that case it will be found to differ from the one at bar in this:

The Illinois statute compelled the banks to pay the taxes out of the dividends upon their shares, and hence if they paid illegal taxes an action might arise in behalf of the stockholders against the bank.

Under the Ohio statute, however, the bank was not compelled to pay the tax; it was simply permitted to do so. *See Sec. VII. of Ohio Statutes, cited, supra.*

Aside from the question of mistake in the manner the assessment was originally entered on the duplicate, and considering only the case as it remains after the correction of the duplicate, it is difficult to see how the bank in its corporate capacity could be subjected to a multiplicity of suits in case of an illegal assessment against the shares of its stockholders.

Certainly, whether the tax was legal or illegal, the bank was not compelled to pay it.

The bank cannot consistently claim to be threatened with a multiplicity of suits for doing what the law does not require it to do.

If the tax was illegal the bank could have quietly abstained from any action in the premises, and the Treasurer would have been powerless against it, except as to the notice provided for in the 6th section of the act. To restrain the Treasurer from serving such a notice would hardly be ground for an injunction.

The principle in *Dows vs. Chicago*, which is claimed as authority in this case, is laid down as follows:

"The cross bill filed by the bank presents different features. That institution insists that if it paid the tax levied upon the shares of all its numerous stockholders out of the dividends upon their shares in its hands, which it is required to do by the law of the State, or if its shares were sold, it would be subjected to a multiplicity of suits by the shareholders, and were it an original bill the jurisdiction of the court might be sustained on that ground."—p. 112.

The Treasurer, to have enforced this tax by a sale of the shares, would have been compelled to bring his suit against the shareholders, not against the bank.

III.

ARE THE STATUTES WHICH PROVIDE FOR ASCERTAINING THE VALUE OF THE SHARES OF STOCK IN NATIONAL BANKS IN VIOLATION OF THE PROVISIONS OF THE OHIO CONSTITUTION?

The provisions of the Constitution which it seems to be claimed are violated, read as follows:

"Laws shall be passed, taxing by uniform rule all moneys, credits and investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property, according to its true value in money. Constitution, Art. XII., Sec. 2."

"The General Assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned and all other property, effects or dues of every description without deduction of all banks now existing or hereafter created, and of all bankers, so that all property employed in banking shall bear a burden of taxation equal to that imposed on individuals. Art. XII., Sec. 3.

It is conceded that a uniform percentage has been levied upon all the property in the City of Toledo subject to assessment, the shares of the Merchants National Bank included.

It is claimed that the statutes providing for the assessment and valuation of the shares of bank stock have produced a difference of taxation as between the property of the Appellee and all property of other kinds in the same City and County.

This latter proposition we deny.

Possibly it may be that in Lucas County some kinds of property have not been assessed at their actual or usual selling price in money, and that as a result, such property may have escaped the just proportion of taxation.

Where does the blame rest, with the law, or the execution of the law?

If the Legislature should fail to provide laws for the taxation of moneys, credits, investments in bonds, stocks, and joint stock companies, then probably it could be said that the mandate of the Constitution had not been complied with.

So also, if the law did not provide a rule for the taxation of such kind of property which was uniform, then it might be properly claimed that the provision of the Constitution was violated and the taxation illegal.

If, however, there has been a mistake, inadvertence, or willful maladministration of the law in one regard, how can it be said that because in another regard the provisions of the Constitution have been obeyed and the law has been faithfully executed, therefore, and for that reason, an illegality exists?

It is possible that, owing to the lack of uniformity in the execution of different laws, there has been a failure in securing strictly equal taxation, and consequently an injustice. Yet it must appear that the constitutional provision has been violated before the tax can be avoided, and the constitutional provision simply requires the passage of laws providing for a uniform rule.

If the assessors or officers to whose hands has been committed the execution of the law vary in their method of executing it, so that with some there has been a strict adherence to some constitutional standard, *e. g.*, an assessment of property according to actual value, while with others that standard has not been adhered to, certainly the law cannot be blamed.

And that assessment which is made in strict accordance with the constitutional requirements, certainly cannot be set aside because other assessments have not been made in accordance with the constitutional requirement.

The answer sets up that the Legislature has passed numerous statutes for the purpose of carrying out the provisions of the Constitution.

A brief reference to these statutes or a portion of them may not be out of place.

An act for the assessment and taxation of all property in this State and for levying taxes thereon according to its true value in money. Passed April 5th, 1859; Laws of Ohio, vol. 56, p. 175, and the following acts amendatory and supplementary thereto to-wit.: An Act passed March 29th, 1861, to be found in the 58th volume of said laws, beginning on the 47th page, and an Act passed March 30th, 1864, to be found in the 61st volume of said laws, page 623, and also an Act passed April 10th, 1865, to be found in the same volume, page 144, and an Act passed March 30th, 1868, to be found in the 65th volume of said laws, page 144, and also an Act passed May 8th, 1868, to be found in the same volume beginning at the 166th page, whereby the Legislature of the State of Ohio has required that all property of every description within the State shall be entered for taxation at its true value in money, and be placed upon the duplicate of the proper County for taxation, at its true value.

These and other statutes have in the wisdom of the Legislature been passed providing various methods of assessing and taxing property.

In every statute there is the requirement of a valuation for purpose of taxation at actual value.

Such was the requirement of the law regarding the property which it is alleged by the appellee was not subjected to the proper proportion of taxes.

It will be observed that different methods of assessment have been devised for different classes of property and different offices and agencies provided.

1. Personal property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, the property of individuals or firms is required to be listed by the owner at its value under oath and returned to the township or ward assessor, who returns the same to the Co. Auditor.—*S. & S. p.* 758; *S. & C. p.* 1438.

In case of neglect or refusal by the owner the assessor makes up the list of the articles of personal property and their value belonging to the individual upon such evidence as he can obtain, and in absence of positive evidence from general reputation.

The assessor also makes each year a list of real estate not before on the duplicate and a valuation of new structures.

2. For real estate special district assessors are elected decennially with supervising and equalizing City, County and State Boards.

In addition the annual City and County Boards are required to put all property on the duplicate each year at its value, either by raising or lowering, when they do not find it so listed. See for exposition of powers of annual City and County Boards *Mitchell & Watson vs. Treas. of Franklin Co.*, 25 *Oh. St.*, *p.* 159.

3. For railroads a similar scheme to the statutes com-

plained of in the case at bar has been devised, viz: A board composed of Auditors of Counties through which the railroad passes, constituting a board of valuation, and their action submitted to be revised and equalized by a State Board of Equalization composed of precisely the same persons that compose the Board of Equalization of bank shares.—*S. & Sayler Statutes, pp.* 768 *and* 769.

If the law for the taxation of bank shares is unconstitutional, then certainly all the railroad property in the great State of Ohio has been illegally taxed for many years.

4. Express and telegraph companies make returns through a local agent to the County Auditor of the receipts of the company for the year, and in case of refusal to make such return, then action may be brought in a proper court by the Auditor to ascertain the correct amount of receipts.—*S. & S., pp.* 769-771.

5. All corporations, except banking, and corporations whose taxation is specially provided for, list for taxation all personal property, which shall be held to include all such real estate as is necessary for the daily operations of the company. These returns are made to the County Auditor.—*Laws of* 1876, *p.* 139.

6. Insurance Companies incorporated outside of Ohio list for taxation to the County Auditor the amount of gross recipts of such agency, and the company is taxed for the amount of these gross receipts the same as other property, and at the same rate.—*Laws of* 1876, *Vol.* 73, *O. L., p.* 139.

7. For banks and bankers and moneyed capital, special methods of assessment have always been provided in obedience to the special mandate of the Constitution.

All these statutes require that the property shall be assessed at its actual value in money.

In regard to most property, so that uniformity, equality and justice may be secured, the laws have provided for a Board of Equalization to supervise the returns of owners of property and the action of assessors, and to equalize the valuation of the class of property brought before them by bringing every valuation for assessment to the standard of actual selling or market price.

We have an annual county board for the equalization of real and personal property, money and credits of the county, exclusive of cities of the first and second class, to be composed of the County Commissioners and County Auditor.

For cities of the first and second class we have an annual city board for the equalization of values of real and personal property, moneys and credits in such cities, to be composed of the County Auditor and six citizens of each city, to be appointed by the Common Council.

We have a decennial county board for the equalization of real property in the county, except in cities of the first and second class, to be composed of the Auditor, Surveyor and County Commissioners.

We have a decennial city board for equalization of real property in the cities of the first and second class, to be composed of the County Auditor and six citizens selected by the Common Council.

The above four boards are required to examine the returns of the assessors (ward or district), and they have power to add to or deduct from the valuations in said returns, whether said returns are made on the oath of the owner or upon the valuation of the Assessor.

The annual boards are to be governed by the same rules as the decennial board.

We quote the statutes establishing Boards of Equalization:

SEC. 39. "The County Auditor, the County Surveyor, the County Commissioners, or a majority of them, shall form a County Board for the equalization of the real property of their county, with the exception of the real property in cities of the first and second class, which shall be equalized by a special board, as hereinafter provided. They shall meet on the first Tuesday after the first Monday of September, one thousand eight hundred and sixty-nine, and every tenth year thereafter, at the Auditor's office, in the several counties, when the county Auditor shall lay before them, returns of the real property made by the several district assessors of such county, with the additions he shall have made thereto, and having each taken an oath fairly and impartially to equalize the value of the real estate of such county, according to the provisions of this act, they shall immediately proceed to equalize such valuation, so that each tract or lot shall be entered on the tax list at its true value, and for this purpose they shall observe the following rules:"

"1st. They shall raise the valuation of such tracts and lots of real property, as in their opinion have been returned below their true value, to such price or sum as they may believe to be the true value thereof."

"2d. They shall reduce the valuation of such tracts and lots, as in their opinion have been returned above their true value, *as compared with the average valuation of real property of such county* having due regard to their relative situation, quality of soil, improvement, natural and artificial advantages possessed by each tract or lot."

"3d. They shall not reduce the aggregate value of the real property of the county below the aggregate value thereof, as returned by the assessors, with the additions made thereto by the Auditor as hereinafter required. The county Auditor shall keep an accurate journal on record of the proceedings and orders of said board."—*Sayler's Statutes, p.* 414.

Sec. 40. " There shall be a special board for the equalization of the real property in cities of the first and second class, to be composed of the county Auditor and six citizens in each of said cities, to be appointed by the city council. Said Board shall meet at the Auditor's office in said city, on the fourth Monday of October, one thousand eight hundred and seventy, and every tenth year thereafter, and shall have power to equalize the value of the real property within such city, and shall be governed by the same rules, provisions and limitations that are prescribed in the preceding section for the government of the county boards for the equalization of property.—*Sayler's Statutes, p.* 415.

" Sec. 42. The State Board of Equalization shall consist of as many members as compose the State Senate chosen at the last previous election of members of the General Assembly, and representing the same districts, all of whom shall have the qualifications of electors, and the qualified electors of each senatorial district shall, at the October election, in the year one thousand eight hundred and eighty, and each tenth year thereafter, elect persons to serve as members of such Board of Equalization, in accordance with the provisions of this act; and the return of the poll books and the certificate of election shall be governed by the law regulating the election of senators; and in case of vacancy in such office, either by death, resignation, or otherwise, the Governor of the State shall have the power to appoint a person, who shall be a resident elector of the district so vacated, to fill such vacancy, as soon as he shall be informed thereof; the Auditor of State shall, by virtue of his office, be a member of this Board. The said Board shall meet at Columbus, on the first Tuesday of December, one thousand eight hundred eighty, and every tenth year thereafter, and the members thereof shall each take an oath or affirmation that he will, to the best of his knowledge and ability, so far as the duty devolves on him, equalize the valuation of real property among the several counties and towns in the

State, according to the rules prescribed by this act for valuing and equalizing the value of real property; and having received from the Auditor of State the abstracts of real property transmitted to him by the several County Auditors, said Board shall proceed to equalize the same among the several towns and counties in the State, in the manner hereinafter prescribed."

First. "*They shall add to the aggregate value of the real property of every county, which they shall believe to be valued below its true value in money, such per centum in each case as will raise the same to its true value in money.* Second. *They shall deduct from the aggregate valuation of the real property of every county which they shall believe to be valued above its true value in money, such per centum, in each case, as will reduce the same to its true value in money.* Third. If they shall believe that right and justice require the valuation of real property of any town or towns in any county, or of the real property of such county not in towns, to be raised or to be reduced, without raising or reducing it in the same ratio, they may, in any such case, add to or take from the valuation of any one or more of such towns, or of property not in towns, such per centum as they shall believe will raise or reduce the same to its value in money. Fourth. If in their judgment the aggregate value of all the real property of the State as returned by the County Auditors is above or below its true value in money, they may increase or reduce it, but such increase or reduction shall not exceed twelve and one-half per centum of said aggregate: provided, that if any increase or reduction shall be made in the valuation of the grand aggregate, it shall only be made after the equalization of all the counties of the State, and when such increase or reduction is made, it shall be the same per cent of the equalized valuation in every county of the State. Fifth. Said Board shall keep a true and full account of their proceedings and orders; provided, that all the provisions of this act shall apply to and govern the action of the State Board of Equalization elected at the October election, in the year one thousand, eight hundred and seventy."—*Sayler's Statutes*, p. 2430.

Sec. 44. "There shall be an annual County Board for the equalization of the real and personal property, moneys and credits, in each county, exclusive of cities of the first and second class, to be composed of the County Commissioners and County Auditor, who shall meet for that purpose at the Auditor's office in each county, on the first Wednesday after the third Monday of May, annually. *Said Board shall have the power to hear complaints and to equalize the valuation of all real and personal property, moneys and credits, within the county, and shall be governed by the rules prescribed in the thirty-ninth section of the act to which this is an amendment,* for the government of County Boards for the equalization of real property; provided, that *said Board shall not reduce the value of the real property of the county below the aggregate value thereof, as fixed by the State Board of Equalization,* nor below its aggregate value on the duplicate of the preceding year, to which shall be added the value of all new entries and new structures over the value of those destroyed as returned by the several Township Assessors for the current year."—*Sayler's Statutes, p.* 416.

Then we have an annual State Board of Equalization of the values of the shares of incorporated banks and banking associations, whether organized under the laws of Ohio or of the United States, to be composed of the Auditor of State, Treasurer of State, and Attorney General, who have power "to hear complaints, to equalize the valuation of such shares as fixed and determined by the County Auditors," * * "by adding to the valuation of the shares of any such bank or banking association as in their opinion are assessed below their value in money, or by reducing the valuation of the shares of such bank or banking association as have been assessed above their value in money."—*Laws of* 1876, *Vol.* 730, *O. L., p.* 251, *cited supra p.* 4.

Then we have an annual State Board for railroads, consisting of the same persons as the State Board for banks, to constitute a Board for the equalization of the values of the property of railroad companies as the same are fixed by the County Auditors. Their power is to "hear complaints and equalize said values by adding to the valuation of the property of such companies as have been undervalued, and deducting from the valuation of the property of such as have been over valued; provided, the Board shall not reduce the aggregate below the amount returned by the County Auditors."—*Laws of* 1867, *p.* 58, *S. and S., p.* 768.

It will be observed that throughout all the plans which have been devised by the Legislature for placing property on the tax list run these two guiding provisions:

1st. A return upon oath to some officer, by the owner or his agent, giving a schedule and his own valuation of his property, or in case of failure to make a verified return, a listing and appraisal by the officer.

2nd. An action upon these lists and valuations for the purpose of equalizing the valuation by Boards of Equalization, called, as the case may be, City, County or State Boards of Equalization.

Most of the returns are made to Ward or Township Assessors, but many are made to County Auditors.

All the returns are submitted to the revision of County, City or State Boards, as the case may be.

These two governing features characterize the scheme for assessing and valuing bank shares.

To this general plan there seems to be an exception as to one class of property, viz: railroad companies. The first listing is made, not by the owner, as in all other classes of property, but an appraisal is made by the officer of the law, being the Auditor of the County through which the road runs, and their appraisal submitted to the State Board of Equalization.

If the fact that a scheme of assessment for one class of property different from that applied to most of the other property of the State, is a violation of the constitutional provision, then surely the railroad companies owning property in the State of Ohio would have the most right to complain.

These Companies have had, it will be conceded, counsel skillful, learned and watchful of the interests of their clients. It is hardly to be supposed that for 13 years .they would have permitted their clients to pay taxes unconstitutionally and illegally assessed. Yet they have done so if there is any shadow of substance in the argument in this case. For there is on record in the Courts of Ohio no case where the constitutionality of the law providing for assessing Railroad property has been attacked

But it is said that the law providing a State Board of Equalization for bank shares, is in contravention of the constitution because it "withdraws the assessments of one entire class of property from revision by comparison with assessments of other property?"

The fact is, there is no rule universally followed for the selection of assessors of property throughout the State of Ohio.

In cities of the first and second class, all the property returned to the assessor and auditor except Railroads and bank shares, is subjected to the action of the Board of Equalization made up in one way. In counties containing such cities, the property of persons living outside of the city and in counties not containing such cities, the property of all persons is subjected to the action of a Board of Equalization made up in an entirely different way.

Then some property, *e. g.*, receipts of telegraph and express companies is not subject to the action of a Board of Equalization at all.

Which of these classes of property is assessed in the regular and which in the irregular way? Which assessment is constitutional and which unconstitutional?

But we understand our learned friends who contend for the unconstitutionality of the Statutes to argue this way:

That the Legislature provided for a decennial valuation of real property and an equalization of that valuation by a State Board and that such valuation being established as a common standard, the several City and County Boards bring all other valuations into conformity with this and thus has been established a uniform rule, to which everything must be squared.

It is perhaps sufficient to say at this point of the argument, that the assumption that the valuations of personal property depend upon the valuation of realty, is unfounded.

Certain kinds of personal property come before annual Boards of Equalization for action and the same Board pass upon the values of real property. But in no place does the law recognize the valuations of the decennial State Board of Equalization for real estate as furnishing a rule or standard of valuation of personalty, nor as in any way influencing the action of assessors or Board of Equalization of personal property.

It seems also to be claimed that the State Board for equalizing decennial assessments of realty in 1870, did not do their duty in placing values upon the real estate of the various counties, in that they permitted the values to be fixed at less than their actual selling value.

To make this apparent they bring forward two witnesses.

One witness, who says he was a member of the Decennial State Board for 1870, testifies as follows:

"Affiant further says that he believes, and it was generally understood by the members of said State Board of Equalization that the real value of said real estate as equalized by said State Board of Equalization, but before said reduction of 12 per cent. of the total amount, was about 55 to 60 per cent. of the prices for which said real estate could be sold, and that after said reduction of 12 per cent. the valuation of the real property of Ohio for purposes of taxation, so fixed by said State Board of Equalization, averaged about one-half of the amount for which it might be sold or what might be considered the usual selling price of said real estate for cash." *Testimony of D. W. H. Howard, p. 26 of record.*

Another witness says he was a member of said State Board of Equalization; that after the equalization by said State Board, as above, the entire aggregate valuation of the real estate of the State was reduced by deducting 12 per cent. of such aggregate valuation and that the balance of 88 per cent. constitutes the taxable valuation of real estate upon which taxes for the state, county, school, city and township purposes, have been levied and collected and including 1871.

"Affiant further states that he well knows that the real value of the real estate of the State of Ohio, and the prices for which said real estate would readily sell for money, is much above the valuation as fixed for purposes of taxation by said State Board of Equalization, and that in the opinion of said affiant such taxable valuation does not exceed 60 per cent. of the value for which the real estate of the State would readily sell for money."—*Testimony of Theodore Williams, p. 26 of Record.*

There were 33 members of the State Board of Equalization. Out of that number two have been found to hazard an opinion that the average values as fixed by that Board were 50 to 60 per cent. of the ordinary selling value. The testimony of these witnesses was objected to at the trial. Rather their affidavits were permitted to be read subject to objection on the ground of incompetency and irrelevancy.

It was the duty of the Board "to add to the aggregate value of the real property of every County which they shall believe to be valued below its true value in money, such per centum in each case as will raise the same to its true value in money, and, second, to deduct from the aggregate valuation of the real property of every County which they shall believe to be valued above its true value in money such per centum in each case as will reduce the same to its true value in money."—*Vol.* 65 *Ohio L.*, *p.* 166. *S.* & *S.*, 751.

Without now discussing the competency or relevancy of the evidence, which will be considered in another place, it may properly be remarked that the testimony of these two witnesses cannot be of very great value.

It is to be presumed that the Board of Equalization being under oath, and acting as a Board of appraisers, presented in the valuation they fixed on real estate the result of the consideration of the majority of its members. And if only two now testify that the action of the Board was incorrect it is not a violent presumption to assume that the remainder of the Board stand by their official action. Until a majority can be found willing to testify to the contrary we assume the Court will conclude that the Board did no otherwise than comply with the law, and the valuation by them fixed upon the real estate was its true valuation according to their judgment.

Possibly, however, the witness may be right in saying that the real estate at that time was selling in the market for higher prices than the Board placed upon it. Was the selling price its actual value? Not unlikely the prudent and conservative members of the Board were not willing to take the measure of values on the height of speculative times and inflated, irredeemable currency values as the correct, honest money standard to last for an entire decade. Perhaps if "fiatism" could have its way that standard would have been found to be permanently too low. Inasmuch, however, as the fever of 1870 has subsided, it is more than probable most people will say the selling values of property in 1870 were not its actual money value.

Assuming, however, that by competent testimony it has been shown that the members of the State Board of Equalization fixed a standard of values below the actual value, the argument is made that the City and County Boards of Equalization and individual assessors conformed their action to this and fixed values for taxation, different from the actual value, at the same standard as the State Board, and that thus a system has been established which has become a uniform rule conformable with the Constitution, and the basis of that system is a valuation less than actual money value.

"Having thus complied with the Constitution," seems to run the argument, "by violating it, we find a statute which has been executed differently from the system, and is therefore unconstitutional. The system or custom of violating the Constitution and the law has been so long established, that it has usurped and taken the place of the Constitution. *Communis error facit jus.*"

"While the Constitution has not been in fact overthrown, yet it has been quietly displaced by a long-existing and well-recognized practice different from its provisions so that when, ignorant of this fact, officers have conformed their action to the requirements of this obsolete instrument, they find that they have violated the Constitution."

It perhaps will not escape the attention of the Court that there are some weak points in the argument.

The assumption, however, that the valuations made by the State Board have been followed by the County and City Annual Boards, is not supported by the law nor by the testimony.

The duty of the Annual Boards is to raise or lower the values of each parcel of realty or piece of personalty they find on the duplicate, or return of the assessors to be appraised differently from its real value, so that it shall conform to actual value, subject to the limitation that the aggregate of real values shall not be diminished below the preceding year, nor below the aggregate fixed by the State Decennial Board.—*See Mitchell vs. Treas. Franklin Co.*, 25 *Ohio St.*, *p.* 158.

It being the duty, then, of the Equalization Boards each year to conform values for taxation to actual values, if they have not done so it is the failure of the officers for that year to do their duty, and not a compliance with a system of conformity based on a violation of the law and the provisions of the Constitution.

IV.

WHAT IS MEANT BY THE PROVISION AS TO UNIFORMITY OF TAXATION, IN ART. XII., SEC. 2, OF THE CONSTITUTION?

It is to be noticed that this is not a grant of power, but a regulation thereof, the power to tax being embraced in the general grant of legislative power.—*Baker vs. Cincinnati, 11th Oh. St.*, 534-543.

This regulation is to govern the Legislature in its making rules and devising methods for taxation of the groups or classes of property mentioned in the article of the Constitution.

The Constitution does not execute itself. It merely prescribes the character of the laws to be enacted by the Legislature.—*Frazer et al. vs. Siebern*, 16 *O. S.* 623.

The Legislature is required to provide:

1st. A law, regulation, or rule, uniform as to the class of property for whose taxation provision is made.

2d. The law, regulation, or rule, shall also require the property to be taxed upon the *ad valorem* principle, its true value in money.

There seems to be little difficulty in understanding the meaning of the latter regulation, unless it be claimed that something more is intended than a direction to the Legislature as to what requirement should be inserted in the law.

Let us inquire, then, what is meant by UNIFORM RULE, in the particular clause of the Constitution?

It was said by the Supreme Court of Ohio, over twenty-five years ago, that this provision required uniformity, not only in the *rate* of taxation, but also uniformity in the mode of assessment upon the taxable valuation.—*Exchange Bank vs. Hines*, 3 *Oh. St. R., p.* 15.

The Judge who delivered the opinion in that case did not say what he meant by "uniformity in the mode of assessment."

If he had meant that all the details in every step of the process of making an assessment upon property for taxation should be the same for every class of property in the State, it is singular his meaning was never discovered, and an attempt made by the Legislature to conform its legislation to such doctrine, for the machinery of the law for assessing and valuing property for taxation has in Ohio always varied more or less with the various groups or classes to be reached for taxation.

The same opinion, however, recognized that the Legislature is to exercise its discretion in this matter. We quote:

"Although the taxable valuation of the moneys and credits of the merchant, and perhaps the moneys and credits of every other person, should be ascertained by an average for the year, yet the rule for *estimating* the taxable valuation is left by the Constitution to legislative discretion. The rule of taxation is prescribed by the Constitution; *but the mode of ascertaining the value of property is regulated by law."—Exchange Bank vs. Hines, supra, p.* 22.

The same Court in another case uses this language:

"Art. 12, Sec. 2, requires a uniform rate per cent. to be levied upon all property according to its true value in money, within the limits of the local subdivision for which the revenue is collected.' *Zanesville vs. Richards*, 5 *Oh. St.*, 589.

In a recent case a statute providing for a special valuation of new plats in cities was held not in violation of this provision.—*Mitchell & Watson vs. Weas, etc.*, 25 *Oh. St*, 158.

Judge Cooley, in speaking of this question, says:

"Whatever may be the basis of taxation, the requirement that it shall be uniform is universal. But to render taxation uniform in any case two things are essential. The first of these is that each taxing district should confine itself to the object of taxation within its limits. Otherwise there may be duplicate taxation, and of course inequality. * * * * * * The second essential is that the apportionment should reach all the objects of taxation within the district."—*Cooley on Constitutional Limitations, pp.* 499 *and* 501.

A recent writer speaking on the subject of uniformity of taxation, uses this language:

"The general idea conveyed by these provisions is that taxes shall be assessed according to some ratio or rule of apportionment, so that A shall pay upon a piece of property of a certain value the same amount as B upon a similar piece of property of equal value."—*Burroughs on Taxation,* § 51.

The Constitutions of many other States contain provisions enforcing the same principle as the Ohio Constitution, and have frequently been before the Appellate Courts for consideration.

A careful examination of the decisions fails to reveal a single case where a statute has been overthrown because it provided a special agency for the assessment and valuation of any particular class of property.

The cases where taxes and laws have been upheld as well as those where they have been decided invalid, seem to establish that the Constitutional principle of uniformity of taxation is not violated whenever there exists these conditions, 1st, the same rate or percentage of taxation assessed upon all the property; 2nd, a common standard of valuation for all property, either in the taxing district, or belonging to the class sought to be subjected to taxation. See *Cooley on taxation pp.* 132–144, for a classification of the provisions of the various Constitutions on this subject, and a reference to the decisions under them.

If he had meant that all the details in every step of the process of making an assessment upon property for taxation should be the same for every class of property in the State, it is singular his meaning was never discovered, and an attempt made by the Legislature to conform its legislation to such doctrine, for the machinery of the law for assessing and valuing property for taxation has in Ohio always varied more or less with the various groups or classes to be reached for taxation.

The same opinion, however, recognized that the Legislature is to exercise its discretion in this matter. We quote:

"Although the taxable valuation of the moneys and credits of the merchant, and perhaps the moneys and credits of every other person, should be ascertained by an average for the year, yet the rule for *estimating* the taxable valuation is left by the Constitution to legislative discretion. The rule of taxation is prescribed by the Constitution; *but the mode of ascertaining the value of property is regulated by law.*"—*Exchange Bank vs. Hines, supra, p.* 22.

The same Court in another case uses this language:

"Art. 12, Sec. 2, requires a uniform rate per cent. to be levied upon all property according to its true value in money, within the limits of the local subdivision for which the revenue is collected.' *Zanesville vs. Richards,* 5 *Oh. St.*, 589.

In a recent case a statute providing for a special valuation of new plats in cities was held not in violation of this provision.—*Mitchell & Watson vs. Weas, etc.*, 25 *Oh. St*, 158.

Judge Cooley, in speaking of this question, says:

"Whatever may be the basis of taxation, the requirement that it shall be uniform is universal. But to render taxation uniform in any case two things are essential. The first of these is that each taxing district should confine itself to the object of taxation within its limits. Otherwise there may be duplicate taxation, and of course inequality. * * * * * * The second essential is that the apportionment should reach all the objects of taxation within the district."—*Cooley on Constitutional Limitations, pp.* 499 *and* 501.

A recent writer speaking on the subject of uniformity of taxation, uses this language:

"The general idea conveyed by these provisions is that taxes shall be assessed according to some ratio or rule of apportionment, so that A shall pay upon a piece of property of a certain value the same amount as B upon a similar piece of property of equal value."—*Burroughs on Taxation*, § 51.

The Constitutions of many other States contain provisions enforcing the same principle as the Ohio Constitution, and have frequently been before the Appellate Courts for consideration.

A careful examination of the decisions fails to reveal a single case where a statute has been overthrown because it provided a special agency for the assessment and valuation of any particular class of property.

The cases where taxes and laws have been upheld as well as those where they have been decided invalid, seem to establish that the Constitutional principle of uniformity of taxation is not violated whenever there exists these conditions, 1st, the same rate or percentage of taxation assessed upon all the property; 2nd, a common standard of valuation for all property, either in the taxing district, or belonging to the class sought to be subjected to taxation. See *Cooley on taxation pp.* 132–144, for a classification of the provisions of the various Constitutions on this subject, and a reference to the decisions under them.

The Court will remember that in the case at bar, precisely the same rate was levied upon the shares of stockholders of every other bank or banking association located in the City of Toledo, whether organized under the laws of the State of Ohio or of the United States, as was levied upon the shares of stockholders in Appellees bank as well also upon all the real or personal property in Toledo.

There are a number of decisions where the Constitutionality of schemes of taxation similar to the ones under discussion have been attacked and upheld.

In California the Constitution requires that "taxation shall be equal and uniform" and that all property in the State shall be taxed in proportion to its value."

It was held that a State revenue law is not void for want of uniformity because the regulations of different counties as regards enforcing collections of delinquent taxes were different.—*Wilson vs. Supervisors of Sutton*, 47 *Cal.*, 91.

In Indiana, the Constitution provides that "the General Assembly shall provide by law for uniform and equal rate of assessment and taxation and shall prescribe such regulations as shall secure a just valuation for taxation of all property both real and personal."

It was claimed where the law provided a special method for the appraisement of the real estate belonging to a Railroad that it was in contravention of the Constitutional provision. The Court sustained the law saying

"The Constitution does not require a uniform method of valuation of property but 'only such regulations as shall secure a just valuation for taxation of all property, both real and personal.' The Legislature must use a discretion as to the best method of securing a just valuation of property, and unless the method adopted be clearly inadequate to secure that result, we cannot question its action."—*The Louisville & N. A. R. R. Co. vs. The State ex. rel. McCarty, etc.*, 25 *Ind.* 177.

So also in a National Bank case the Constitutionality of the law was questioned on the ground that as to the listing and valuing of all his other personal property each owner is allowed to attend to it himself, but as to National Bank stock he is represented by an officer of the bank.

The Court held the act not to be in violation of the provisions of the Constitution above cited.—*Whitney et al. vs. Ragsdale*, 33 *Ind.*, 107.

In Illinois the Constitution says:

"The General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to his or her property." Also, "The corporate authorities of Counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

An act was passed for taxation of Bank shares by the Legislature very much like the one in Ohio.

It was held to be Constitutional although it was as the Court said, "apparent *that a system of taxation for bank shares was designed peculiar to itself and independent of the general revenue system of the State. McVeagh vs. The City of Chicago et al.* 49 *Illinois*, 318.

The same statute was considered and its Constitutionality affirmed in *Tappan vs. Merchants National Bank*, 19 *Wallace*, 490.

Special laws providing for a special method of assessment upon property adjacent to or benefited by the improvement have been held time and again not inconsistent with the principle of uniformity.

People vs. Mayor etc. of Brooklyn, 4 *N. Y.*, 419.
Scoville vs. Cleveland, 1 *Oh. St.*, 126.
Hill vs. Higdon, 5 *Oh. St.*, 243.
Maloy vs. Marietta, 11 *Oh. St.*, 636.
Reeves vs. Treas. of Wood Co. 8 *Oh. St.*, 333.
Northern Ind. R. R. Co. vs. Connelly, 10 *Oh. St.*, 159.

The language of Chief Justice Waite, in *Tappan vs. The Merchants National Bank*, 19 *Wallace*, seems to summarize the good sense of the subject, and is so applicable to the objections made in the case at bar, that we take the liberty of quoting a portion of it:

> "Absolute equality in taxation can never be attained. That system is the best which comes nearest to it. The same rules cannot be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, manufacturing associations, telegraph companies, and each one of the numerous other agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for the purpose of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different systems, adjusted with reference to the valuation of different kinds of property, are adopted."—19 *Wallace*, *p.* 504.

Followed and approved in *St. R. R. Tax Case*, 92 *U. S. R. S*, 575 *and* 611, where the scheme for apportionment and equalization of railroad property in Illinois, similar to the one in Ohio, both for railroads and bank stocks, was held to be not in violation of the Constitution.

See also *Cooley on Taxation*, *p.* 127.

The bank shares being upon the duplicate, as admitted, at their actual value, if it should happen that other property by accident, mistake, or otherwise was omitted it would not invalidate the tax on the shares.

Exchange Bank vs. Hines, 3 *Oh. St.,* 1.
Muscatine vs. Mississippi, 1 *Dillon,* 536.
High on Injunction, § 355.
Cooley on Taxation, p. 154.
Burroughs on Taxation, p. 61.

If an omission to tax other property would not invalidat the tax, surely listing it a lesser value should not.

SOME AUTHORITIES ON THE OTHER SIDE CONSIDERED.

We have not the advantage of knowing what authorities will be relied upon to support the Appellees position further than the cases cited in the argument below.

A series of cases in Wisconsin, viz.: *Hervey vs. Supervisors of Barron Co.,* 37 *Wis.,* 75; *Marsh et al. vs. Supervisors of Clark Co.,* 42 *Id.,* 502, *and Schettler vs. the City of Fort Howard,* 43 *Id.,* 48, hold that where the assessors, to whom was committed the listing and valuation of real property, made the assessment in disregard of the directions of the statute, *e. g.* valued property at one-third its value, when the statute required it to "be valued by the assessor from actual view at the full value which could ordinarily be obtained therefor at private sale, and which the assessor shall believe the owner if he desires to sell would accept as full payment," then such an assessment and valuation was void and the tax invalid. The Court places its decision on the ground that the plain provisions of the statute were utterly disregarded by the assessor, who assumed to make the assessment according to an arbitrary standard adopted by himself.

The cases could be cited as authority were our friends representing the owners of real and personal property whom they claim to have shown by the affidavits of assessors and others were suffering an illegal assessment.

In the case at bar, however, we are examining the proceedings of a Board of Equalization, who appear to have regarded their official oaths and performed their duty in the manner enjoined by law. They were required to equalize the shares and to raise those valued too low so that their ultimate valuation should be their actual value in money. And they did it. Certainly, cases where a tax was defeated because officers willfully disobeyed the directions of the law, cannot consistently be cited as authority for overthrowing a tax assessed in every stage in strict conformity to law.

In reducing the valuation of the shares in appellee's bank to 40 per cent. of their actual value, as in effect it did, it seems to us the court below has committed the same error as the Wisconsin assessors, and the Wisconsin cases can fairly be cited as precedents for reversing its decision.

The case of *Beaureau Co. vs. C. B. & Q. R. R. Co.*, 44 *Ill.*, 229, apparently the main reliance of counsel for appellee, is not in harmony with the Wisconsin cases, for the court seem to recognize the validity of an assessment upon a valuation much less than actual value, although the statute made actual valuation the standard.

The difference between that case and the one at bar is plain.

1st. The valuation complained of was higher than other valuations of the same kind of property, real estate, in the county, which was the taxing district.

2nd. The whole matter was before the court, on appeal, authorized by statute, from the action of the Board of Supervisors, which was the Equalizing Board. By this appeal the Court took the place of the Board and might fairly consider valuations of other property, so that the values should be equalized.

In the case at bar no application was ever made to the Board of Equalization by appellee or his stockholders for relief.

In *Mitchell & Watson vs. The Treasurer, 25th Oh. St.*, 158, the Court refuse any relief in equity in a case similar to this, on the ground that the party might have appealed to the Board for adjustment of his grievance. "Until," says the Court, "they exhaust the remedy thus provided by statute, a court of equity should not interfere in their behalf."

The language authorizing an application for redress is precisely the same concerning Boards of Equalization for bank shares as it was in that case, viz: "said Board shall hear complaints and equalize values."

Here we have an authoritative expression by the Supreme Court of Ohio of the Ohio statute.

Under this decision, authoritative and controlling, appellee must go out of court on account of his own laches.

V.

DO THE OHIO STATUTES CONTRAVENE THE NATIONAL BANK ACT?

The learned Judge in announcing the decision in the Court below, said that in the taxation of Appellees shares not only was there a contravention of the Constitution of the State of Ohio but also of the provisions of the National Banking law He did not say in what particular the National Banking law was violated, so we are left to conjecture.

We claim there has been no such violation.

The provisions of the National Banking law on this subject, as amended Feb'y 10, 1868, are as follows:

"The Legislature of each State may determine and direct the manner and place of taxing all the shares of National Banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon any other monied capital in the hands of individual citizens of such State, etc." — *Revised Statutes, Sec.* 5219.

The Legislature of Ohio has done precisely what it was authorized to do, and no more.

It has provided for the taxation of the shares of all banks, State as well as National.

What is there in this case, either in the pleadings or proof, to show that taxation has been at a greater rate than other moneyed capital in the hands of individual citizens.

The ratio of taxation, the percentage of levy, was the same, in the City of Toledo, upon all property within its limits, real and personal, bank shares and monied capital included, and such being the case, the shares of Appellee's bank were not invidiously dealt with.

Says the Court in *People vs. Commissioners*, 4 *Wallace*, 244.

"Upon a true construction of this clause of the act, the meaning and intent of the law makers were that the rate of taxation of the shares should be the same, or not greater, than upon the moneyed capital of the individual citizen, which is liable or subject to taxation. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens."

To the same effect is *Adams & Co. vs. the Mayor, etc., of Nashville*, 95 *U. S.*, 19.

No such objection exists to the statutes of Ohio as did in *Van Allen vs. The Assessors*, 3 *Wallace*, 573, and *Bradley vs. People*, 4 *Wallace*, 459.

In New York the statute, as in Ohio, provides that shares in National Banks shall be assessed "on their value," and at "their full and true value." Says the Court, in *People vs. Commissioners*, 94 *U. S. R.*, 415, in commenting on this statute, "The shares of stock in New York should be assessed for taxation at their actual value." To the same point, also, *Hepburn vs. School Directors*, 23 *Wallace*, 480.

VI.

THE TESTIMONY.

The Court below based its decision on the testimony, consisting of a number of affidavits which, by consent of counsel, were considered as depositions, taken upon notice, but subject to exception as to their relevancy. The Court did not pass the valuation of the shares in the Merchants' National Bank was in strict conformity to the law, and that the tax is legal and valid.

We therefore ask that the decree of the Court below be reversed.

HAMILTON & FORD.
For Appellant.

Supreme Court of the United States.

WILLIAM CUMMINGS, *Treasurer, versus* THE MERCHANTS' NATIONAL BANK.

FRED. W. PELTON, *Treasurer, versus* THE COMMERCIAL NATIONAL BANK.

REPLY TO ARGUMENTS OF APPELLEES.

The case of the Toledo Bank arises under the act of 1876. Under that act the returns were made, in the first instance, to the County Auditor, who was required to place on the shares a valuation. The returns of all the banks, with the valuations made by the respective auditors, were then transmitted to this State Board, who were authorized to equalize these valuations by adding to such as were below their true value in money, or by reducing those which were above their true value in money, and upon the valuation thereof, as thus determined, the shares were put on to the duplicates of the respective counties and taxed at the same rate as other property.

The case of the Cleveland Bank arises under the act of 1877. Under this act, as under the former, the returns of the bank were, in the first instance, made to the County Auditor, and he was required to put on the shares a valuation according to their true value in money. The returns of the banks with his valuation on the shares were then to be handed over to the County Board of Equalization, and this board was authorized to equalize the valuation of the shares as made by the County Auditor, with full power to equalize said shares according to their true value in money.

The returns of the banks and the valuation made by both the Auditor and the County Board were then transmitted from all the counties to the State Board, who, by the terms of that act, were made a Board of Equalization of these shares, as determined by the county auditors and county boards, and directed to equalize the valuations of both the auditors and county boards, but were limited in the amount to which they might either reduce or raise the total aggregate of all the valuations in the sum of $100,000. The precise difference between the two acts then is this: That in the latter act there is, first, the additional factor of an equalization and valuation of the County Board, to that of the sole action of the auditor of the county in the former; and secondly, that in the equalization of both of these valuations by the State Board a limitation of the total aggregate of change over the local valuations in the sum of $100,000; while in the former act there is no limitation except that in their change of increase or decrease they are to be governed by their judgment as to the actual value in money of the shares.

There is also in the record of the two cases but one difference in the pleadings. In the Toledo case the claim of relief is based solely upon the operation of the act itself, the averments of the bill being that by the necessary operation of the act itself the shares of the bank are taxed higher than other property in the city of Toledo or the county of Lucas. In the Cleveland case there are the same averments as to the operation of the act of 1877, and the further allegation, which is in these words, (page 3, printed record,) "Their property in this corporation is not valued and taxed the same as the property of individuals, and the burden of taxation imposed is very much greater, nor has any equality been preserved in the valuation of the shares for taxation, compared with other property in the locality where the bank is established; on the contrary, the valuation in proportion to the market value is fully twice as much as that fixed on other property, while the rate of the levy is the same."

Just how much this averment was intended to be an averment of fact, irrespective of the operation of the law itself, we were unable to determine, but for caution's sake the answer expressly denied the whole averment, (page 5, printed record.) In the lengthy brief of the counsel of appellee, all that is here averred as matter of fact, outside of the necessary operation of the act itself, is dismissed with a single sentence. On page 23 counsel asserts: "the evidence established that the valuation put on these shares by the County Board was higher in proportion than that affixed to other personal property." We insist that no such fact is established by the evidence. There was but one witness. From his testimony it does not appear he knew anything about the valuations placed on the property of individuals in the city where the bank is located, he states he could not name any piece of real estate that was assessed below its true value in money, nor did he know of the return of any individual citizen in which was returned a security of equal value to United States bonds at less than its face value. It further appears that he knew nothing of the market value of these shares, neither the witness or the board of which he was a member, make any comparison of the value of the securities held by the bank for its loans and discounts with the notes and mortgages held by individuals or private banks for loans. Indeed, it appears, that no inquiries as to the actual value of the bonds held by the bank, or of the securities held for loans and discounts, was made by the witness or his board, and his actual statement in evidence is that he had an *impression* that the value placed by the County Board on the shares of this bank was a "*little higher*" in proportion to the valuation as compared with other personal property, and "*he thinks* the values his board placed on the shares of these banks were higher than the assessed value returned by private banks." It is submitted that the mere thought and impression of a witness who made no comparison between the actual value of the assets of this bank and the property, The returns of the banks and the valuation made by both the Auditor and the County Board were then transmitted from all the counties to the State Board, who, by the terms of that act, were made a Board of Equalization of these shares, as determined by the county auditors and county boards, and directed to equalize the valuations of both the auditors and county boards, but were limited in the amount to which they might either reduce or raise the total aggregate of all the valuations in the sum of $100,000. The precise difference between the two acts then is this: That in the latter act there is, first, the additional factor of an equalization and valuation of the County Board, to that of the sole action of the auditor of the county in the former; and secondly, that in the equalization of both of these valuations by the State Board a limitation of the total aggregate of change over the local valuations in the sum of $100,000; while in the former act there is no limitation except that in their change of increase or decrease they are to be governed by their judgment as to the actual value in money of the shares.

There is also in the record of the two cases but one difference in the pleadings. In the Toledo case the claim of relief is based solely upon the operation of the act itself, the averments of the bill being that by the necessary operation of the act itself the shares of the bank are taxed higher than other property in the city of Toledo or the county of Lucas. In the Cleveland case there are the same averments as to the operation of the act of 1877, and the further allegation, which is in these words, (page 3, printed record,) "Their property in this corporation is not valued and taxed the same as the property of individuals, and the burden of taxation imposed is very much greater, nor has any equality been preserved in the valuation of the shares for taxation, compared with other property in the locality where the bank is established; on the contrary, the valuation in proportion to the market value is fully twice as much as that fixed on other property, while the rate of the levy is the same."

Just how much this averment was intended to be an averment of fact, irrespective of the operation of the law itself, we were unable to determine, but for caution's sake the answer expressly denied the whole averment, (page 5, printed record.) In the lengthy brief of the counsel of appellee, all that is here averred as matter of fact, outside of the necessary operation of the act itself, is dismissed with a single sentence. On page 23 counsel asserts: "the evidence established that the valuation put on these shares by the County Board was higher in proportion than that affixed to other personal property." We insist that no such fact is established by the evidence. There was but one witness. From his testimony it does not appear he knew anything about the valuations placed on the property of individuals in the city where the bank is located, he states he could not name any piece of real estate that was assessed below its true value in money, nor did he know of the return of any individual citizen in which was returned a security of equal value to United States bonds at less than its face value. It further appears that he knew nothing of the market value of these shares, neither the witness or the board of which he was a member, make any comparison of the value of the securities held by the bank for its loans and discounts with the notes and mortgages held by individuals or private banks for loans. Indeed, it appears, that no inquiries as to the actual value of the bonds held by the bank, or of the securities held for loans and discounts, was made by the witness or his board, and his actual statement in evidence is that he had an *impression* that the value placed by the County Board on the shares of this bank was a "*little higher*" in proportion to the valuation as compared with other personal property, and "*he thinks* the values his board placed on the shares of these banks were higher than the assessed value returned by private banks." It is submitted that the mere thought and impression of a witness who made no comparison between the actual value of the assets of this bank and the property, moneys and credits returned by individuals or private banks, and, indeed, who made no actual examination of the credits and resources of the banks establishes nothing, or at least that the value thus placed on the shares without knowledge and without inquiry was "*higher*" or a "*little higher*" than the valuation returned by individuals or bankers. This difference in averment of fact between the two bills may, we think, be left out of consideration. The real claim in both these cases is that the necessary operation of the acts in question puts a higher valuation on the shares of banks than is placed by law on other property, including moneyed capital of individuals in the locality where the tax is assessed.

And the only difference in the two cases is simply that under the act of 1876 the State Board, in acting upon the returns and valuations as fixed and determined by the county auditors, may increase or decrease without limit, guided only by their judgment as to the actual value in money of the shares, and that under the act of 1877 the General Assembly have fixed the limit to their action in the premises. In the first case, then, the claim is that the act is unconstitutional and void because the State has given the State Board too much power, and in the latter case they have not power enough.

In the argument of Mr. Swayne, on page 7, appears the assumption on which his whole case is made to rest. After giving the general methods of determining the valuations of real-estate, he proceeds to say "the result of this method is that every ten years there is established a standard for comparison of values in assessing for taxation by a fixed valuation of the realty carefully equalized throughout the State. The personalty and betterments are annually appraised, and the appraisements justified by reference to the valuation of the realty."

This statement is a little obscure, but what he intends to say, if he means anything, is, that the different acts to which he refers furnish a standard of value by which personalty is annually appraised; or, in other words, that the value of real estate being determined by these various boards, the personalty is annually appraised in the same proportion to its value as the valuation placed on the real estate bears to its true value. This statement, or proposition, we say is wholly and absolutely an assumption and is entirely outside of the record in these cases. It is an assumption which has no foundation, in fact, it is not to be found in any act, law or practice, but is the exact converse of what the whole legislation of the State commands and is imposed by law on every citizen, board, or official who has any duty to perform in the valuation and taxation of property. The same assumption appears in the first proposition of the argument of the counsel for the Cleveland Bank. On page 9 of his brief, in stating the general meaning of the Constitution of the State in its provision as to taxation of property, he states the purpose to be that all property "shall contribute to the general revenue in exact proportion to its value in money." Neither in the Constitution nor in any decision, nor in the laws which the General Assemby has passed, has there ever been included or expressed the idea contained in these propositions—that is, there has never been included or expressed the idea that in the valuation of property a comparison of the value of one kind of property with another was to be the rule of valuation for taxation, or that property was to be taxed in *proportion to its value* so determined.

The sole and simple command of the constitution is that all property of every kind shall be taxed, and be taxed according to its true value in money, and the uniform rule as used, means a uniform rate. In other words, the valuation of all property was to be at its true value in money, and all property, (the exemptions excepted) was to be valued and placed on the duplicate for taxation, and that in the same locality the levy must be uniform. In accordance with this construction and command of the constitution every individual citizen is required, under his oath, to make out his list of personal property and place a value thereon, according to its true value in money. Every district assessor in valuing each parcel of land is likewise to put on each parcel its true value in money. Every city and county board in their equilization of the values made by district assessors is to be governed by the same rule—they are to put a valuation upon property according to its true value in money. The State Board in their revision of the values of all the county and city boards are likewise to be governed by the same rule. If the city or county boards revise any returns made by individuals in their respective jurisdictions they also are to be governed by the same rules.

In these two acts of 1876 and 1877 in the valuations by the County Auditor of these bank shares, he is directed to fix and determine the value thereof according to their true value in money. In the act of 1876 the same rule is given to the State Board.

The omission to repeat this injunction in the act of 1877, to the State Board therein named, in nowise changed their duty or permitted them to adopt any other standard of valuation. Indeed, the abundant repetition of this rule in the numerous statutes was not needed. It is the rule of the Constitution, and is presupposed to enter into every act of the Legislature. The General Assembly have no power to give to its officials or to any citizen any different rule. The supreme command to the General Assembly is to tax all property according to its true value in money. The officers of the State Board were State officers, and in their acceptance of their respective offices were obliged to take an official oath to support the Constitution, and for them to depart from this standard of valuation in equalizing the valuations of the county officials would be a violation of their official oaths. The most careful perusal of the various statutes in relation to the valuation of property will discover no such idea as is included in this assumption, but a directly opposite practice and conduct is prescribed. The only exception to the use of this language is a part of a sentence in a paragraph relating to the duty of City and County Equalizing Boards in performing their annual duty. While in the general sections, and throughout the whole act, the only rule is that they shall place on every parcel of land its true value in money, and shall, if in their judgment any parcel or tract of real-estate is returned below its true value, raise the same to such sum as they believe to be its true value; it is stated that, in reducing any lot or land which in their judgment has been by the district assessors valued above its true value in money, they shall reduce such valuation "as compared with the average valuation of real property" of the county, &c., but in their aggregate of reduction they shall not reduce the aggregate valuation of the county. From this careful guide to the county and city boards it is sought by the gentleman to build up an entire system of valuation contrary to the Constitution, unrecognized in the whole mass of the legislation on this subject. From this phrase, as used in this connection, it is submitted that no system can be established. From the beginning of the Statutes to the end there is to be found no warrant for the idea that any officer may regulate the value of any property he may be called on to appraise by the value which any other official or person has placed on any other piece of property, whether it be of like kind or of a different sort. The value placed on land is not to be fixed or controlled by the value put on personal property, or *vice versa*. The value placed on a horse is not to be gauged by the value placed on an ox or an ass.

The means or method by which citizens or officials are to arrive at the true value in money, either of land or goods or shares or other intangible property, are not named and cannot be included or expressed in the statutes. They are required to use their intelligence and knowledge to arrive at the conclusion which the Constitution and the laws direct; they are to use their best judgment upon all the facts before them to determine the value of property. If a comparison of the values placed on different kinds of property will tend to help such judgment, they can use such comparison; but that is one means of exercising their judgment in arriving at a conclusion. The law compels them to take no such step, nor does it authorize it. We are not here to defend the wisdom of this Constitution. We think it the crudest piece of work with which an intelligent people were ever burdened. But when it is sought to impeach the earnest and honest effort of the General Assembly to obey its provisions, We insist their action shall not be overthrown by interpolating into the legislation or the Constitution that which has no place therein.

In regard to the evidence in the Toledo case if the court shall find it in any wise competent, we say it does not establish the fact that the individual citizens of the city of Toledo made returns under oath of the true value of property below its true value. It cannot be established as a matter of fact that the real estate in said city is valued for taxation below its true value in money. The question of the true value in money of land or any subject of taxation is after all but a matter of judgment and opinion, and as to that board or body upon whose judgment it shall finally act, is for the State of Ohio itself to determine. When it by law authorized a State board to pass its judgment on its value as a final judgment, we insist that it must be treated by the courts as conclusive. It may be true that the local assessors and the county and city boards of Lucas and the city of Toledo in performing their duty under the decennial appraisement purposely valued the lands below their true value in money; or they might have acted honestly in the belief that the land in Lucas County was very much lower in value than that fixed by other county boards in other counties. But their judgment was submitted to the State Board, and that State Board was required to raise the value of land in Lucas County if in their judgment it had been returned by the local officers at less than the true value thereof. Until it is shown the State Board adopted some other standard of value or acted fraudulently or corruptly the conclusive presumption is that their valuation was correct. If in the years since ensuing these boards have neglected their duty in raising the values, we think it settled beyond dispute that such neglect cannot be taken advantage of by an individual or corporation who has only been assessed at the true value of his property. And the assertion, on page 11 of the printed argument, that this departure from duty by the Lucas County officials has reached a proscriptive course, or that it enjoys or has received the legislative sanction has no place in this record. On page 35 it is asserted that the sworn return of the individual citizen does not govern the assessor. If it is meant by this that there is by law given to the local assessor any control over the return of the individual citizen then the learned gentleman has fallen into error. The local assessor cannot interfere with the sworn return of the citizen. The auditor of the county on such sworn return being filed in his office, having reason to believe it false, can make an examination, call witnesses, and make such additions as the proof will justify. The City Board also can hear complaints and they also can go into an examination of the truth of individual returns and valuations. But they have no arbitrary power, and while their judgment may be conclusive as to the actual value of property possessed by the citizen, they cannot charge him with taxes upon property which he does not own, or if they adopt a wrong standard of value, the law of the State gives ample remedy to protect the citizen. See review of cases *infra.*

In further reply to the cases cited from Illinois and elsewhere, we say that all which is asserted to be decided in those cases, is that taxation in that State must be uniform; that is, that in any county all property shall be valued by a uniform standard of valuation—not that all property is required to be valued at its true value in money, but that the same standard of value is required, and when that is adopted it must apply to all property in the same locality subject to tax. To the application of such a rule we make no contention. It is an entirely different matter from the case of the Merchants' Bank at Toledo. The Constitution prescribes to the legislature a standard of value or rule of valuation, which it was bound to observe, namely, the true value in money of the property to be taxed. This Constitution does not execute itself, but as the instrument itself directs, the legislature must pass laws for carrying its command into execution; that is, to tax all property according to this standard of value, as named in the instrument. The legislature has passed such laws. It has provided for the valuation of all property, and its direction is one and the same to all its agencies employed in the business of valuation, and that is to value the property at its true value in money. Here certain officials who had a partial duty to perform in the valuation of some property in Lucas County, have confessed they disobeyed the law. Certain other witnesses are of the opinion that certain other officials have also disobeyed the law, and that by this disobedience of the law certain property in the county of Lucas has not been valued as the law directs. What opening or crevice is there here offered for applying the decisions so largely quoted in the arguments and printed brief? No person or official by the consent of the State has been authorized to use any different standard of value or rule for valuation than that enjoined by the Constitution, and that prescribed in the act of 1876. There is absolutely nothing in this act to require or permit a departure from the constitutional rule of valuation. Indeed, the complaint in the Toledo case is, that this State Board have obeyed the constitutional rule, and by inference the same thing is claimed in the Cleveland case. The proposition therefore, is that because an act fairly within the power of the General Assembly to pass has been obeyed, it is to be held unconstitutional and void. We have so far considered these cases as they appear to be argued, in common. We propose now to consider briefly, some of the points made by the counsel of the Cleveland case.

First, as to the same methods of valuation—see printed argument of the counsel in that case. It is assumed on page 23 of his argument that the tribunal constituted by law to fix the value of the shares of the bank have decided upon their value, and that because the value fixed by this board on these shares is less than finally fixed by the State Board it is thereby demonstrated that the tax on this excess is illegal and just so much in excess of the tax levied on other property in the city of Cleveland. This proposition then affirms that the valuation fixed by the county board upon a subject of taxation is binding upon the State, and cannot in any wise be revised, altered or changed by the action of other boards; or that when a county official has put a valuation on property, and the law requires a county board to equalize this first valuation and fix a valuation thereon, then such action of the county board is final and conclusive and binding upon the State. If his proposition does not mean this, then it has no force. We ask, where does the gentleman find such authority to be given to the action of any county or other board? Where in the Constitution, or otherwise, is to be found any provision requiring the State to abide by the judgment of any one board upon the valuation of property to be taxed? What is there in the Constitution to limit the State in its action to any one board, however constituted? In this case the Auditor is directed first to value the shares; then the county board is required by the law to act upon his values. What is there to prevent the State from requiring the county board, first to act, and then the Auditor to pass on their valuations? What constitutional inability is there in preventing the State from requiring this duty of equalizing the valuation to be done by the judges? Is it not perfectly competent for the State to provide that the judges of each judicial district shall upon the returns made place a valuation thereon?

We have seen that as to real estate, the State does not rely on the judgment of the county boards as final, nor is there nor can there be pointed out any limitation of power upon the General Assembly to treat the action of any particular board as final. At what point in the proceeding the State shall adopt the judgment of any board as the final result is purely within the legislative discretion. Indeed, there is nothing in the Constitution or the nature of things which requires the Legislature to have any county or city boards of valuation whatever. Under the Constitution, all property is to be valued according to its true value in money, and all is to be taxed. The value of property is a matter of opinion to be determined in the manner that the State shall provide, subject only to those limitations given for the exercise of legislative powers. It cannot appoint any board to perform this duty, and in adopting a method for arriving at the value of any particular class of property, it cannot provide one method for one county and one for another, but it must be by a uniform law. It cannot provide for giving to any board or official, or any means to be adopted, one rule or standard of value, and to another a different rule or standard of value, and after the valuation is made and the property placed on the duplicate for taxation, in the same locality, the levy or rate must be uniform. And we again repeat, subject to these limitations, the Legislature may adopt any method for arriving at valuation which in its judgment it may deem wise. It might have left the whole matter to the township and ward authorities. And in its methods of requiring the judgments of different boards, and of one board to act upon the judgment of another, it is only for the purpose of arriving as near as human means will give to a just result.

What then is there in the finding of this county board as to the value of these shares that determines that the increase of value of these shares by the State Board is illegal or in excess of the value of other property in the city of Cleveland? This board, as we have shown, does not value a single cent of the property in the city of Cleveland. If the valuations by this board were to be made by comparison with the valuations of other property in the city of Cleveland there is nothing in the official character of this board to give to their judgment the character of finalty above that of the judgment of any other board which the Legislature might have required to perform the same duty. They might have passed a law that there should be a board elected whose duty it was in every county to equalize all valuations of property returned by individuals or by district or local assessors, by whom valuations should be made. Hence, we submit that the State was in no wise bound to abide by the judgment of this county board or of any board. The point at which the State might rest was dependent on its own good judgment, and inasmuch as the whole legislative power of the State is vested in the General Assembly it is only to be governed by its own judgment at what point it will determine and finish the valuation of property for taxation. So long as the Legislature complies with the limitations on the exercise of its power and furnishes to its officials and board the standard of value for estimating the value of property, and requires all property to be valued, it has obeyed the constitutional injunction, and no law passed in the exercise of this judgment can be said to be in contravention of the Constitution.

The last objection made to the act of 1877 is that this State Board is simply a board of equalization and not valuation also. In so far as equalization can be performed without an actual valuation, this is a true statement of the object of the act and of the duties of the duties of the Board. But why the State may not require simply a board to equalize as well as to authorize the Board to value and equalize, we fail to see. It is but a step in the matter of arriving at the value to be finally fixed on property subject to taxation. That the State cannot authorize a Board to act as an equalizing board upon one kind alone, is, as we have shown, wholly untenable. There is nothing in the Constitution to forbid such a course. There is nothing in the Constitution or the law to require that in calling upon a board to equalize one class of property that they should make this equalization by a comparison with the values placed on other property. With the values placed on other property the boards have nothing to do. Each valuation of every kind of property is to be, at we have shown, according to its true value in money; and it is as competent for the Legislature to authorize a board to equalize the value on shares as to equalize the value of real-estate. It is impossible to point to any distinction between the power to do the one or the other. The whole objection that has been raised to this procedure by the State is, as we have shown, the unwarranted assumption that in placing values upon property subject to taxation, that value is to be fixed by a comparison with the values placed on other property, and to be regulated by such other values. There is nothing in the frame of this law that authorizes the board to depart from the standard there prescribed by the Constitution. There is nothing in the record by which any presumption can be raised that this board in its action departed from this standard, and there is nothing in fact to show that on like moneyed capital a single citizen of Cleveland is valued at any lower standard of value than the true value in money of his property.

In the Beaurean County, Ill., case, there was no provision in the Constitution of Illinois requiring the valuation of all property at its true value in money, but simply a requirement that there "should be a tax by valuation so that every person should pay a tax in proportion to his or her property." In this particular case, the valuation of all the property in the county had been made at 50 per cent. of its real value, and the railroad company valued their property at same ratio. The supervisors without interfering with the general valuation throughout the county, raised the valuation of the railroad company 40 per cent. The railroad company appealed to the circuit court, under a special provision of the statute authorizing such appeal, and the circuit court, (acting in fact, as an equalizing board) changed the valuation of the Board of Supervisors so that the property of the railroad company was valued the same as other property similarly situated in the county. The county authorities appealed to the Supreme Court, who sustained the action of the circuit court. There is no analogy or parallel between that case and the one at bar.

In this case, there was nothing to show that a single individual citizen of Toledo or Lucas County made his return falsely or below its true value in money. The real estate of the county had been valued at its actual value in money by the State Board by whose final judgment the whole realty of the State had been valued for taxation, and nothing in fact, to show that in the valuation by the State Board they had not followed the provisions of the law and the Constitution requiring them to value it at its actual value in money.

The whole extent of the proof is this, that in the matter of additions and new buildings, the assessors and county officials had wilfully neglected their duty, and had not returned the same at their true value in money; and further, that if there were any citizens who neglected to make returns of their personal property, the assessors and county officials had neglected to perform their duty in returning such omitted property at its true value.

Further, there is the opinion of various parties that the valuation of real estate in that county is below its true value, and the further opinion of other witnesses that they think the State Board did not perform its duty, and appraise the value of real property at its actual value in money. And the inference might possibly be further drawn that the county and city equalizing boards had from year to year neglected to increase the value of real estate. If it had increased in value, or they had been called upon to act upon a false or omitted return of an individual citizen of personal property, they had likewise neglected their duty.

The whole sum and substance then of all this evidence is that by the neglect or misfeasance of Lucas County officials, some property has been permitted to be taxed upon a valuation below its true value in money.

There is nothing in the Constitution of Ohio or its legislation that authorizes the valuation of one kind of property to be guaged by the valuation put on any other. The sole and simple rule of valuation is all to be valued at its true value in money. The principle of the Illinois Constitution of taxing according to proportion, has no place in the Ohio system.

The case of the appellee is that of one who is properly taxed, complaining that the property of some other persons is not taxed at its proper value.

The case in the 87th Ill. was a case where certain taxpayers sought to invalidate a whole assessment.

By the new Constitution of Illinois uniformity of taxation is enjoined, but no rule of valuation given. By a statute the valuation in taxation was required to be according to true value in money. In practice under the old Constitution this law was neglected, but the valuations were generally fixed at 50 per cent. of its true value.

There was a State Board of Equalization who were limited to 1 per cent. in the charge of aggregate of valuations. They did not increase to true value in money, for they were in this dilemma: If they raised the valuation as the statute required they exceeded the limit the statute imposed upon them and consequently they did not raise the value as statute required. It was claimed this invalidated the whole assessment, but the Supreme Court held that obedience to the Constitutional rule was paramount and refused to set aside the tax. This decision has no application to the system of taxation and valuation in Ohio.

The other cases cited are a portion of the innumerable cases found in the reports arising out of alleged failure to comply with the law by the officers charged with duty of levying taxes, and, where relief is sought, because the party complaining is suffering from or seeking to avoid illegal taxes. No question of constitutional interpretation arises in any of them.

S. O. GRISWOLD,
J. K. HAMILTON,
Counsel for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1879.

WILLIAM CUMMINGS, TREASURER OF LUCAS COUNTY,
Appellant,

vs.

THE MERCHANTS' NATIONAL BANK OF TOLEDO,
Appellee.

BRIEF FOR APPELLEE.

WAGER SWAYNE,
For Appellee.

LEADER PRINTING COMPANY, CLEVELAND.

SUMMARY.

The laws of Ohio require each private and corporate bank to furnish annually an exhibit of its resources and liabilities, for the information of those who are to fix the valuation of its property, or shares, as a basis of taxation.

The final valuation, for this purpose, of property at large, in Ohio, is made annually, in each county, or city, by a board constituted for that purpose.

Prior to 1876, the exhibit from each bank was finally reviewed by the proper county or city board, and the same rule of valuation was applied to it as the property at large in that vicinity.

An act of the Assembly of 1876 took these exhibits from the local boards entirely, and created a State board, by which they should be finally appraised.

The local boards for 1876, among them those of the city and county in which the complainant's bank is situate, in making their assessments (which embraced all property except bank capital and railroads) were controlled by a prescriptive rule of valuation, which was less than half of what was deemed by those boards to be "the true value in money," in each instance, of the property assessed.

The State board for 1876 adopted "the true value in money" as its rule for valuation of bank capital, and upon that basis fixed the valuation of complainant's shares. Complainant was thus charged with more than double its proportion of city, county and State taxes for that year.

If upon any shares such taxes were not paid, the laws of Ohio forbid complainant to pay any dividend upon, or permit any transfers of such defaulted shares, and further authorized the Treasurer to collect such defaulted taxes by levy or distraint.

Complainant received notice from a number of its shareholders they would not pay upon the basis which the State board had adopted, and forbid complainant's paying from their funds. Complainant was thereby exposed to multiplicity of suits, and to contiuuing and irreparable injury. To avoid these, complainant brought this bill, first making tender, which has since been paid, of the full tax, for city, county and State purposes, upon a basis something higher than that of the property at large.

The National Bank law requires that the tax on bank shares shall be not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens. The constitution of Ohio extends this requirement of uniformity to property at large. An uniform rate is defined by the Supreme Court of Ohio to involve an uniform assessment, according to the value.

The decree below stands in complainant's favor showing, to prohibit collecting the excess.

IN THE

Supreme Court of the United States.

WILLIAM CUMMINGS, TREASURER OF LUCAS COUNTY,
Appellant,

vs.

THE MERCHANTS' NATIONAL BANK OF TOLEDO,
Appellee.

STATEMENT OF THE CASE.

The appellee, complainant below, was in 1876, a National Banking Association, of Toledo, Ohio, having a capital stock of five hundred thousand dollars, divided into five thousand shares, of one hundred dollars each.

The decree below stands in its favor to enjoin the collection of a percentage of State, County and City taxes, which percentage stands charged to it on the books of the plaintiff in error, after it has paid all of such taxes to the full amount charged in said City, County, and State, upon other property of equal value.

> "Suffice it to say, that from the pleadings and proofs it very satisfactorily appears, that complainant's capital stock was assessed for taxes for the year 1876 at its full value, while all other property in the same city was assessed at from 30 to 40 per cent. only of its real value, and that by reason of this unequal assessment, complainant's capital stock was, in the

hands of its shareholders, onerated with an undue proportion of the public taxes.

"It is not important to inquire into the methods leading to such a result; whether from inadvertence or design, the consequences are the same to the complainant. It is an injustice that contravenes the constitution of Ohio, as well as the provisions of the National banking law, and a wrong which the courts may, when their powers are properly invoked, take cognizance of and redress.

* * * * * * * * * *

"Hence, in view of the probable consequences, I have reached the conclusion, that the complainant, in its corporate capacity, is entitled to a standing in this court, and to relief, and I shall therefore authorize a decree, permitting complainant to pay to the defendant, or into the registry of the court, 40 per cent. of the amount of the tax assessed against its shareholders, in accordance with its tender heretofore made, and on this being done, that an injunction be issued, perpetually enjoining the collection of the residue thereof."—*Opinion, Record, p*, 28.

The provisions of the Constitution of Ohio, and of the National Bank Act, which are above referred to, are as follows:

"Laws shall be passed, taxing by uniform rule, all moneys, credits, and investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money."—*Constitution, Article XII, Sec.* 2.

"The General Assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects or dues of every description—without deduction—of all banks now existing, or hereafter created, and all bankers, so that all property employed in banking, shall bear a burden of taxation equal to that imposed on the property of individuals."—*Art. XII, Sec.* 3.

* * * * * "The legislature of each State may determine and direct the manner and place of taxing all the shares of National Banking associations located within the State, subject only to these two restrictions, that the taxation shall not be at a

greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National Banking association owned by non-residents of any State, shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, County or municipal taxes, to the same extent, according to its value, as other real property is taxed."—*U. S. Revised Statutes, Sec.* 5219.

The origin of such an excessive difference of valuation, against one species of property, or rather the property of one species of corporate individuals, lies in a recent innovation upon the systematic and established tax legislation of the State.

Prior to 1876, real and personal property in Ohio, including shares in National banks, were appraised for taxation under a system which was applicable, and applied, to all property alike, except such property as was not wholly situate within one taxing district.

The details of this system were:

1. A decennial appraisement, by one and the same person, of each item of *real* property within such separate precinct.

Sec. 24. "The County Commissioners of each County in this State, shall, at their June session, in the year one thousand eight hundred and sixty-nine, and every tenth year thereafter, divide their county into suitable and convenient districts, not less than the number of townships in their county; and any county within the limits of which there is a city, the commissioners shall divide said city into districts, comprising within each, not less than one ward, nor more than five; * * and the qualified electors of such districts shall, at the October election, in the year Eighteen hundred and sixty-nine, and every tenth year thereafter, elect some citizen of such district, having the qualifications of an elector, as assessor of real property within such district."

Sec. 29. "Each district assessor shall, on or before the first Monday of July, One thousand eight hundred and seventy, and every fifth year thereafter, make out and deliver to the auditor of his county, a return in tabular form, contained in a book to be furnished him by such auditor, of the amount, description and value of the real property subject to be listed for taxation in his district." Swan & Sayler's Statutes, p. 751.

2. Bringing together for comparison all of such appraisements made within one county or within a city of the first class, and their equalization by a city or county board.

Sec. 39. "The County Auditor, the County Surveyor, the County Commissioners, or a majority of them, shall form a County Board for the equalization of the real property of their county, with the exception of the real property in cities of the first and second class, which shall be equalized by a special board, as hereinafter provided. They shall meet on the first Tuesday after the first Monday of September, one thousand eight hundred and sixty-nine, *and every tenth year thereafter*, at the Auditor's office, in the several counties, when the County Auditor shall lay before them returns of the real property made by the several district assessors of such county, with the additions he shall have made thereto, and having each taken an oath fairly and impartially to equalize the value of the real estate of such county, according to the provisions of this act, they shall immediately proceed to equalize such valuation, so that each tract or lot shall be entered on the tax list at its true value, and for this purpose they shall observe the following rules:"

Sec. 40. "There shall be a special board for the equalization of the real property in cities of the first and second class, to be composed of the County Auditor and six citizens in each of said cities, to be appointed by the city council. Said board shall meet at the Auditor's office in said city, on the fourth Monday of October, One thousand eight hundred and seventy, *and every tenth year thereafter*, and shall have power to equalize the value of the real property within such city, and shall be governed by the same rules, provisions and limitations that are prescribed in the preceding section for the government of the county boards for the equalization of property."—*Sayler's Statutes, p.* 415.

3. Equalization of these several county and city aggregates of realty by a Decennial State Board, so fixing the valuation of the realty for the ensuing decade.

SEC. 42. "The State Board of Equalization shall consist of one member from each senatorial district of the State, except the first district, which shall be entitled to three members, all of whom shall have the qualifications of electors; and the qualified electors of each senatorial district shall, at the October election in the year one thousand eight hundred and eighty, and each tenth year thereafter, elect persons to serve as members of such Board of Equalization, in accordance with the provisions of this section."

"The said board shall meet at Columbus, on the first Monday of November, one thousand eight hundred and sixty-nine, and every tenth year thereafter, and the members thereof shall each take an oath or affirmation that he will, to the best of his knowledge and ability, so far as the duty devolves on him, equalize the value of real property among the several counties and towns in the State."

"If in their judgment the aggregate value of all the real property of the State, as returned by the County Auditors, is above or below its true value in money, they may increase or reduce it, but such increase or reduction shall not exceed twelve and one-half per centum of said aggregate; provided, that if any increase or reduction shall be made in the valuation of the grand aggregate, it shall only be made after the equalization of all the counties of the State, and when such increase or reduction is made, it shall be the same per cent. of the equalized valuation in every county of the State."—*Sayler's Statutes, p.* 2331.

4. Annual appraisement in each precinct, extending to all personalty, and to *such realty as may have escaped taxation, or have been improved by building.*

"Each township assessor shall annually, at the time of taking a list of personal property also take a list of all real property, situate in his township, that shall have become subject to taxation since the last previous listing of property therein, with the value thereof, estimated agreeably to the rules prescribed therefor, by the ninth section of this

Act, and of all new buildings or other structures of any kind, of above one hundred dollars in value, the value of which shall not have been included in the valuation of the land on which such structures have been erected, and shall make return to the County Auditor thereof, at the time he is required by this Act to make his return of personal property."

5. Equalization by annual city and county boards of these appraisements of both personal and real property, *with the valuation of the realty, as fixed by the decennial State Board.*

SEC. 45. "There shall be a special board for the equalization of real and personal property, moneys and credits, in cities of the first and second class, to be composed of the County Auditor and six citizens of each of said cities, to be appointed by the City Council of such city. *Said Board shall meet annually at the* Auditor's office in said cities, on the fourth Monday of May, and shall have power to equalize the value of the real and personal property, moneys and credits, within said cities, and shall be governed by the same rules, provisions and limitations that are prescribed for the government of County Boards for the equalization of real and personal property, moneys and credits; provided, that said board shall not be authorized to extend its sessions beyond the fourth Monday in June in each year.—*Sayler's Statutes, Vol.* 2, *p.* 1646, *IX.*

SEC. 44. "There shall be an annual County Board for the equalization of the real and personal property, moneys and credits, in each county, exclusive of cities of the first and second class, to be composed of the County Commissioners and County Auditor, who shall meet for that purpose at the Auditor's office in each county, on the first Wednesday after the third Monday of May, annually. *Said Board shall have the power to hear complaints and to equalize the valuation of all real and personal property, moneys and credits, within the county, and shall be governed by the rules prescribed in the thirty-ninth section of the Act to which this is an amendment* for the government of County Boards for the equalization of real property; provided, that *said board shall not reduce the value of the real property of the county below the aggregate value thereof, as fixed by the State Board of equalization*, nor below its aggregate value on the dupli.

cate of the preceding year, to which shall be added the value of all new entries and new structures over the value of those destroyed, as returned by the several Township Assessors for the current year.—*Sayler's Statutes, p.* 416.

The rules referred to are those provided for the decennial city and county boards, and are as follows:

"1st. They shall raise the valuation of such tracts and lots of real property, as in their opinion have been returned below their true value, to such price or sum as they may believe to be the true value thereof."

"2d. They shall reduce the valuation of such tracts and lots as in their opinion have been returned above their true value, *as compared with the average valuation of real property of such county*, having due regard to their relative situation, quality of soil, improvement, natural and artificial advantages possessed by each tract or lot."

"3d. They shall not reduce *the aggregate value of the real property* of the county, below the aggregate value thereof, *as returned by the assessors*, with the additions made thereto by the Auditor as hereinafter required. The County Auditor shall keep an accurate journal or record of the proceedings and orders of said board."—*Sayler's Statutes, p.* 414.

The result of this method is that every ten years a standard for comparison of values, in assessing for taxation by a fixed valuation of the realty, carefully equalized throughout the State. The personalty and betterments are annually appraised, and the appraisements justified by reference to the valuation of the realty. The equal burden of the revenue which this method insures has kept substantially the same method in force since 1824.

April 12th, 1876, a law was passed eliminating all bank shares and capital employed in banking from this method, and providing for such property an independent method of appraisement.

The details of this method are as follows:

1. Annual appraisement by each county auditor, of the "liabilities and resources of such banks within the county," and expression of his estimate by valuation, in each instance, of the shares of corporate banks, and of the capital of banks not corporate.

SEC. 5. "The Auditor of the county in which such bank or banking association may be located, upon receiving the return provided for in the 4th section of this act, shall deduct from the actual total value of the shares in any such bank or banking association, the appraised value of the real estate owned by such bank banking association, as the same stands assessed on the duplicate, and the remainder of the total value of such shares shall be entered on the duplicate of the county, in the names of the owners thereof, in amounts proportioned to the number of shares owned by each, as returned by said sworn statement, and be charged with taxes at the same rate charged upon the value of other personal property at the place where such bank or banking association is located."—*Sayler's Statutes, Vol. 2, p.* 1362.

2. Annual equalization of all such appraisements by the Auditor of State and the Attorney General, sitting together as a "State Board for the equalization of bank shares."

SEC. 3. "That the Auditor of State, Treasurer of State and Attorney General shall constitute a Board of Equalization of the value of the shares of such banks or banking associations of this State, as fixed and determined by the several County Auditors of the State for the purposes of taxation under the provisions of said act; said Board shall meet annually on the third Tuesday of June, at the office of the Auditor of State, in Columbus, and shall have power to hear complaints, and to equalize the valuation of the shares of such banks or banking associations, as fixed and determined by the several County Auditors under said act, by adding to the valuation of the shares of any such bank or banking associations as in their opinion are assessed below their value in money, or by reducing the valuation of the shares of any such bank or banking associations as in their opinion have been assessed above their value in money."

Here, then, are two sources of final authority—city and county boards for the appraisement of "real and personal property, moneys and credits" in their several jurisdictions; and a special State board for appraisement of "the liabilities and resources of such bank or banking association." It is the separation, so far as the process of appraisement is concerned, of the real and personal property, moneys and credits of one class of corporate individuals from those of all other corporate and all natural individuals.

The Circuit Court found it to be clearly proved that the appraisement by one board of the shares of the capital stock of the defendants in error was the same as their full value; while the real and personal property, moneys and credits of other individuals within the city and county, and as far as appears throughout the State, were appraised uniformly at a little more than one-third of their full value.

The great bulk of the property being thus appraised at a depreciated value, the levy is of course distorted in the opposite direction. The percentage of taxation in Toledo, for 1876, was four $\frac{64}{100}$ dollars upon each hundred dollars for tax purposes. This was levied on complainant's shares, appraised at their full value, and exclusive of, and in addition to the tax imposed by the United States. The aggregate is nearly equal that of the prohibitory tax imposed by the United States on State bank notes. The bank must quit or find relief. If there is no relief, then there is power in the State, in actual exercise, for the destruction of these agencies of the United States.

The testimony upon which the Court's conclusion rests was introduced below by the defendants in error, and is all the testimony in the case. There is really no question of fact in the case; the assignments of error extend only to the right to prove the facts, and to the right to have relief.

The claim for relief is not based upon alleged mistake of judgment. It is conceded frankly that when appraisements for taxation are by law confided to the judgment of an individual or board, Courts cannot override the law by putting their conclusions in the place of those the law prescribes. But when the law prescribes the exercise of judgment by a single rule, and there has been instead the substitution of a different rule, or fraud or failure in the application of the rule, courts have the same cognizance of such wrongs as of all other breaches of the law. The issue then requires but the demonstration of the breach. This is the course of reason and of precedent.

There is in this case a rule prescribed by law for the control of both boards, and the proof is positive of a departure from the law. The extent of the departure is destructive of the rule.

Both of the systems of appraisement above given are in every feature covered by directions of the statute, that the standard of appraisement always shall be THE

TRUE VALUE IN MONEY of each item of the property appraised.

It is conceded, and agreed on both sides, that the State board, in appraising bank shares, has interpreted the phrase, "true value in money," in its literal and ordinary sense, that which is in the general statute declared to be its meaning, "the usual selling price."

Upon the other hand, those persons who have made the valuations of all other property declare with one consent that they, in making their appraisements, were controlled by an entirely different rule, fixing their valuations at about one-third of what would in their judgment be "the true cash value," or "the usual selling price;" that this was their concerted resolution in advance, made in pursuance of a course which has become prescriptive, and enjoys the fullest legislative sanction, rising practically paramount to the direction of the statute.

Which of these two is justified is not the issue raised, but whether both shall separately operate, under a common levy. That both now operate, with the result complained of, is not seriously questioned; the appeal here prosecuted is against the right to prove the fact and the result, and to enjoy relief.

THE TENDER.

Tender, of the whole of all uncontested factors of the levy, and of the conceded portions of all other factors, is admitted as the necessary forerunner of an application for relief in equity. The ground of the objection lies in this case in the assessment, and so equally affects all factors of the levy.

The taxes complained of in this case were, in the first instance, charged against the bank itself, which was wholly without color of authority in law; and so long as this state of facts continued, tender of any sum was equally void of propriety in fact. In point of time, this condition continued until after December 20th, the last day of the period within which the taxes for 1876, or the first half of them, might be paid. After the lapse of this period, and the passage of the day when the Treasurer is required by law to deliver his books to the County Auditor for settlement, the county authorities proceeded to enter upon the duplicate the names of the shareholders of the bank, and charge against them, as owners of their respective shares, those taxes which, in the administration of the law, should long since have been charged, and of which, if so charged, the shareholders would have had notice the same as they received with regard to the payment of taxes upon their other property, if such other they had. Grave questions of course rise from this act, to be hereafter considered; nevertheless, the bank (although notified by sundry of its shareholders that they regarded the taxes in question as illegal in fact and in the matter above mentioned), desiring to clear itself as far as possible from every imputation beyond its real purpose to secure for itself taxation uniform with that of other property of equal value, immediately tendered to the Treasurer, for all its shareholders, a sum amounting to the full percentage of the levy, upon that valuation of its shares which it is here insisted bears the same proportion to their actual value as the ratio of assessments generally bears to the full actual value of the property they represent.

Complainants' argument and testimony, and the sworn averments of the bill, all point in this case to a generally established basis of assessment for all property not exceeding a given ratio to actual value. The averments of tender show that it offered to pay, "without the condition of a receipt in full," upon a sum bearing the same or a larger ratio to the actual value of the shares. The sufficiency of the proof of this general rule of valuation has been found by the decree, and the sum long since accepted and paid. It is submitted that a tender made under the sanction of this judgment, and upon the basis which it recognizes, has a clear right to be considered by this Court as sufficient. It will moreover be found to fully meet the rigorous and peremptory standard set up by this Court in the State Railroad Tax Cases, or Supreme Court Reports, page 717, that complainants

"Must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. * * *

"If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed, of a receipt in full for all the taxes assessed."

No more strict ruling is known.

ARGUMENT.

Against the complaint made by the appellee, that the valuation of bank shares as compared with that of other property has been systematically unequal and oppressive, every defense is urged but that it is not true. The jurisdiction is denied, and estoppel is insisted on; it is said that however oppressive the result, the modes are not irregular; that the inequality itself is not sufficiently shown; and finally, that so long as bank shares themselves are not appraised beyond their normal value, it cannot be urged, that property at large has been appraised at a depreciated value; but no where, even in the pleadings, is a categorical denial of the truth of the complaint, that a valuation of bank shares, unequal in comparison with that of other property, has been systematically made. There is no testimony, except that which the defendant in error introduced, and it is overwhelming in support of the truth of the complaint.

THE PARTIES TO THE SUIT.

Appellant's first claim, as has been said, is that the defendant in error was not the proper plaintiff. The real interest, it is claimed, was not in the complainant below, but only in the owners of its shares.

The Court below was of a different opinion.

"But the defendant insists that the wrong complained of is a wrong to complainant's shareholders against whom the tax was assessed, and not against the complainant. This objection seemed, on first impression, to have been well taken, but further reflection induces the belief that it involves the rights of complainant as well as the rights of its corporators. Between the two there is an intimate connection; the legal entity, the corporation, is distinct from its shareholders, but the former is a trustee for the latter, and custodian of the corporate funds, and if it shall pay the taxes so assessed, and assume to deduct *the* same from dividends declared, or to be hereafter declared, in favor of its shareholders, it may, and the averment is that it will, subject itself to a multiplicity of suits with its own stockholders; whereas, if it refuses to pay these taxes, it will impair its credit, embarrass its business, and exposes itself to vexatious and expensive suits, and entail upon itself other and irremediable injuries in resisting the illegal exactions made upon it."

The statutes of Ohio provide that the bank may pay the taxes on its shares from any funds or dividends belonging to its shareholders respectively, and that after notice of default made, not only shall the bank permit on transfer and pay no dividends on the defaulted shares but also the Treasurer may proceed by levy or distraint to collect the tax.

SEC. 6. "Any taxes assessed on any such shares of stock or the value thereof, in manner aforesaid, shall be and remain a lien on such shares from the first Monday of May in each year, until such taxes are paid; and in case of the non-payment of such taxes at the time required by law, by any shareholder, and after notice received of the County Treasurer of the non-payment of such taxes, *it shall be unlawful for the cashier or other officers of such bank or banking association, to transfer, or permit to be transferred, the whole or any portion of said stock*, until the delinquent taxes thereon, together with costs and penalties, shall be paid in full. And *no dividend shall be paid on any such stock so delinquent*, so long as such taxes, penalties and costs, or any part thereof, remain due and unpaid."

SEC. 7. "It shall be lawful for any such bank or banking association to pay to the Treasurer of the county in which such bank or banking association may be located, the taxes that may be assessed upon its shares as aforesaid in the hands of its shareholders respectively, and deduct the same from any dividends that may be due or may thereafter become due on any such shares, or deduct the same from any funds in its possession belonging to any shareholder as aforesaid."

SEC. 8. "The County Treasurer *may enforce the collection of any tax or penalty assessed under this act at any time after the same becomes due, by distraint, attachment, or other legal proceedings* instituted in his name as such Treasurer, and in case of his death, or retirement from office before the collection of such taxes or penalties, his successor in office may be made party to such proceedings, and prosecute the same to final judgment and execution."

The averments and proof are that a number of persons owning collectively more than one thousand shares united in a notice to the bank that they did not intend to pay the taxes of that year, believing them illegal and unjust, and forbidding the bank to pay them in their stead from any funds of theirs. The bank became exposed thereby to suit upon refusal to transfer its shares to suits for dividends withheld from the refusing shareholders, also to levy and distraint upon funds in its hands, and shares belonging to those persons, and generally to discredit and the interruption of its business.

"A large number of the holders of said shares have notified your orator that the said tax is illegal and oppressive, and * * * they do not intend to regard said law or pay said taxes, and they forbid your orator to pay and deduct the same from any dividend upon said shares or other funds belonging to said shareholders."

"And your orator further avers that, by reason of the premises, your orator will suffer a multiplicity of suits from said shareholders for its refusal to pay said dividends or to transfer said shares, and will thereby be mulcted in excessive costs and damages, and will suffer in its credit and business irreparable injury; and, moreover, that said illegal and oppressive mode of valuation of your orator's shares and of the shares of other banking institutions have already damaged the property and business of your orator more than five thousand dollars. Unless such methods of valuation be declared illegal by this court, and your orator declared entitled to the assessment of its shares in a manner uniform with the assessment of other real and personal property in said city, county and State, your orator will annually be subjected to multiplicity of suits as above set forth, and will have funds in its possession arising from its dividends or otherwise belonging to its shareholders, distrained upon and seized by the said county treasurer, and the credit and business of your orator will thereby be ruined; and your orator is not able to continue in business in the face of the probability of such methods of taxation and consequent results whereby it suffers and is about to suffer irreparable damage. (Rec., p. 10.)

"Charles C. Doolittle, being duly sworn, says that he is, and for five years has been the Cashier of the Merchants' National Bank of Toledo; that the paper hereto annexed, marked 'A,' was served upon said bank by the signers thereof prior to the commencement of this suit, now pending in the Circuit Court of the United States for the Northern District of Ohio, to enjoin the collection of taxes assessed upon said bank for the year 1876; that the signatures to said paper are genuine, and that the signers were at that time all of them shareholders in said bank in the aggregate to a very large amount, to wit: nearly or quite one hundred thousand dollars.

"Affiant further says that said bank had, at time of the filing of said bill and supplemental bill, nearly one hundred and forty stockholders, and that, so far as known to affiant, none of said stockholders had expressed any willingness or consent that said bank should pay the taxes referred to in said exhibit, but all of said stockholders who were cognizant of the mode of assessment of their shares in that year for taxatien, regarded said taxes as illegal and unjust." Record, p. 27.

The right of an individual to an injunction upon such a showing has been fully defined by this Court, in commenting with approval upon *Heywood* v. *City of Buffalo*, 14 N. Y., 534.

> "In that case, the Court held the general rule to be that a Court of Equity will not entertain an action by the party aggrieved for relief against an erroneous or illegal assessment, but said that this rule was subject to three exceptions, substantially these: Where the enforcement of the assessment would lead to a multiplicity of suits, or where it would produce irreparable injury, or where the assessment on the face of the proceedings was valid, and extrinsic evidence would be required to show its invalidity. Whenever a case was made by the pleadings, falling within either of these exceptions, the Court said that equity would interfere to arrest the excessive litigation, or prevent the irreparable injury, or remove the cloud upon the title, but would not interfere where none of these circumstances existed." *Dows* v. *Chicago*, 2 Wallace, 111.

The right of a National Bank in such a case to sue in its own name was discussed in the same case. The bank, in that case, had come in by a cross-bill, and the jurisdiction failing upon other grounds, the Court said, as to the cross-bill:

> "The cross-bill filed by the bank presents different features. That institution insists that if it paid the tax levied upon the shares of all its numerous stockholders out of the dividends upon their shares in its hands, which it is required to do by the law of the State, or if its shares were sold, it would be subjected to a multiplicity of suits by the shareholders, and *were it an original bill, the jurisdiction of the Court might be sustained.*" (p., 112.)

The suggestion above made is in precise conformity with the facts presented in this case by the original bill. Since the remark above made by this Court, the same view has been taken several times upon the circuit, as well as in the case at bar below.

"The banks occupy, as it were, the position of stakeholders. They are custodians of the property, money and funds of the shareholders, when the latter become entitled thereto, as in case of declaration of dividends. The shareholders insist that their dividends shall be paid to them. The collector demands that they shall be paid to him, or a sufficient amonnt thereof to defray the taxes. And the banks invoke the aid of a Court of Equity to determine to which of the parties the funds belong or should be paid. They assert, and the bills upon this motion are to be taken as true, that they are notified by their shareholders that if they pay these taxes suits will be commenced at once against them. At the same time, if they do not, the State law not only, at least so far as non-resident shareholders are concerned, undertakes to make their officers personally responsible for the amount, which would be perhaps immaterial if the assessments be invalid, but the collector threatens to sell the shares to make the taxes therefrom. It is obvious that the latter course, if taken, would operate to prejudice these corporations in the public mind, and lead to further and harrassing litigation, working that kind of injury to the corporation which, because the law affords no such beneficial and complete remedy for it as the nature of the case requires, may be deemed irreparable. Reference to the case of Dawes confirms this view. Mr. Justice FIELD, in delivering the opinion, says: 'In regard to the cross-bill filed by the bank in that case, that presents different features from those of the original bill; that the bank insists that if it paid the tax levied upon the shares of all its numerous stockholders out of the dividends upon the shares in its hands, which it is required to do by the law of the State, or if the shares were sold, it would be subjected to a multiplicity of suits by the shareholders; and were it an original bill, the jurisdiction of the Court might be sustained on that ground.' This clearly intimates the judgment of the Supreme Court upon this branch of the case, and is to such an extent authority in favor of the jurisdiction, that I feel bound to follow it." *Union Bank* v. *Chicago*, 2d Bissell, 82.

"We assume, in this connection, that all the stockholders in this bank, each having the same ground for relief, and the same defense being applicable to all, might have united in a single bill without multifariousness. (Cooley on Tax, 545.) This being so, we see no objection to the bank maintaining a like bill as trustee for the entire body of stockholders

We should be inclined to go to the limit of the law in sustaining a practice so convenient, and so far as we can see so unobjectionable, assessment of values as an essential prerequisite to taxes upon property, that it is not unsafe to hold that the Constitution itself makes such assessment jurisdictional. It is certainly so by statute; and such a tax, to be valid under the Constitution, must proceed upon a regular, fair and equal assessment of the property to be taxed, made by the officers in the manner, and with the securities and solemnities provided by statnte. These last the legislature may make and alter at pleasure, but no statute can dispense with assessment, or with its essential fairness and equality." *City Bank* v. *Paducah*, (6th Circuit, 1877), 5 Cent. L. J., 348.

THE ALLEGED ESTOPPEL.

Estoppel, by neglect of the complainant to protest to the assessing officers before the valuations were fixed finally, is strenuously urged by counsel for appellant. Whatever strictness is conceded to the rule in such a case, it has no application here. No complaint is urged in the bill against any individual or board by whom appellee's shares at any time were valued; nor yet against the valuation which they reached. The law controlling them was definite and peremptory. It prescribed "the true value in money" as their rule, and without other standard of comparison. Having no qualifying standard in the law, the board took the law literally, and the words in their ordinary sense. There could be neither protest nor complaint of this, for either must go to the law itself, and not to action under it, and that could have no place before a board which itself was constituted by the law.

The board which valued property at large made no appraisement of bank shares, and hence the owners of such shares are in no sense responsible for valuations by that board. Estoppel for not coming into court depends on having had a day in court. There is no possible presumption upon which one who has found a plain rule literally applied in valuing estates like his, can be estopped from showing an intentional and widely different rule, prevailing among those with whom he has had no immediate concern.

A case on this point, cited by appellants' counsel, illustrates the absence of estoppel, and does more. It is there said by the Supreme Court of Ohio:

> "If inequality, however, does in fact exist—if the plaintiff's property is placed on the duplicate for taxation *at a higher valuation than other city property of the same cash value*, or higher than its true value in money, ample provision is made by statute for their relief. It is their right and privilege to complain to the annual city board of equalization for redress, and it is the duty of the board to grant them relief. Until therefore they exhaust the remedy thus provided by statute, a Court of Equity should not interfere in their behalf by enjoining the collection of the debt."—*Mitchell & Watson* v. *Treasurer of Franklin Co.*, 25 O. S., 159.

This is tantamount to a declaration, first, that a valuation higher than that of other city property of equal value has the same force to compel a Court of equity to interfere, as if the property in question were assessed above its money value; second, that but for the existence of the remedy provided by such boards, or after such relief has been ineffectually sought, the existence of either should cause a Court of Equity to interfere.

The statute here complained of "exhausts the remedy" for owners of bank shares by its entire abolition.

Shares are not valued as before, by local boards, the same as other property and by comparison with estimates of that: instead, the statement of resources from each bank, being first valued by the County Auditor, is sent direct to the State Board for the Equalization of Bank Shares," and is there valued by no rule except the opinion of that board as to the "value in money" of the shares, and without equalization with the property at large. It is a singling out of this species of property for valuation by a process which, as regards all other property, is independent, not comparative, and not equalization.

THE RIGHT TO HAVE REDRESS.

The National Bank Law, in prescribing that the tax on shares shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens, simply provides for shares a rule of uniformity with moneyed capital, which by the Constitution of Ohio, is extended to all property whatever. It is there definitely fixed, that property employed in banking shall bear a burden of taxation equal to that imposed on the property of individuals. Either of these has the same force to control State legislation The constitutional provisions have been given above, but may well be repeated here:

> "Laws shall be passed taxing by uniform rule, all moneys, credits and investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money." —*Constitution, Article XII, Sec.* 2.

> "The General Assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other property,

effects, or dues of every description—without deduction: of all banks now existing or hereafter created, and of all bankers, so that all property employed in banking shall bear *a burden of taxation equal* to that imposed on the property of individuals."—*Art. XII, Sec.* 3.

This history and meaning of these two have been judicially announced by the Supreme Court of Ohio through one of the authors of the first provision itself.

"Before the adoption of the present Constitution, the whole matter of taxation was committed to the discretion of the General Assembly. It might be levied upon such property and in such proportion as the General Assembly saw fit, but this discretion no longer exists. * * *
The great object of the provision was to secure equality and uniformity in the imposition of the public burdens."—Zanesville v. *Richards*, 5 *O. S.*, 1.

The widest possible application has also been given to them by the same court, which is of course, the final authority for their construction:

"Taxing by a uniform rule requires uniformity, not only in the *rate* of taxation, but also uniformity in the *mode of the assessment* upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation. But this is not all. The uniformity must be co extensive with the territory to which it applies. If a State tax, it must be uniform over all the State; if a county, town, or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution, does not stop here. It must be extended to *all property*, subject to taxation, so that all property must be taxed alike, *equally*, which is taxing by a uniform rule."—*Exchange Bank of Columbus* v. *Hines, 3d O. S. Rep.*, 15.

A valid tax is therefore peremptorily defined by the Constitution of Ohio, to be an uniform percentage levied upon an appraisement uniform according to the value, both uniform throughout the district upon which the tax is laid.

The ground upon which, in view of these provisions, jurisdiction in this case has been assumed, and also the ground upon which its exercise is challenged, are both stated in appellant's brief, in one of the cases now heard, in the language of the Supreme Court of Ohio:

> "The complaint is that some persons have escaped their proper proportion of taxation, by which means the complainant is taxed too much. If this is true as to the complainant, it is equally true as to every corporation and individual in whose favor no deduction has been made. If the tax assessed is wholly unconstitutional and void as to the complainant, it is equally so as to an immense number of the tax-payers of the State. The question is therefore one whose magnitude can hardly be exaggerated, and it demands all the consideration it has received. THE TAX-PAYERS OUGHT NOT TO BE REQUIRED TO CONTRIBUTE MORE THAN THE CONSTITUTION EXACTS; AND IF HE IS SO REQUIRED, HE OUGHT NOT TO BE REMEDILESS. On the other hand, the demand of too much should not exonerate him from the payment of his proper share; and if a Court of Equity could give relief, it would seem but equitable to make him, in the first instance, pay the proper amount."
>
> "But what means have we of ascertaining the proper amount? None whatever; nor is it at all probable that any evidence could be furnished that would enable us to even approximate it. For as the rate of State taxation is fixed with reference to the grand aggregate of all the taxable property returned in the State, it is obvious that, in order to ascertain the excess of the State tax demanded of the complainant, we would have first to know the amount of all the property in the whole State that had improperly escaped taxation. And in regard to the county, township and city taxes, we would have in like manner to learn what had escaped in their respective boundaries. This looks like an impossibility. If so, does it follow that, as the bad cannot be separated from the good, the whole tax must fall?"

The tax-payer in this instance has first voluntarily offered to pay, and paid, what was deemed the proper amount, and further, difficult as it then seemed to that Court, is fully prepared to show that the proper amount has been correctly as certained.

It is an axiom of the jurisprudence of taxation that judicial cognizance of a departure from the prescribed method and rule of valuation depends on the extent of the result. This cannot be better illustrated than by the supposed instance which, in the case last cited, is presented by the Court in support of an extravagant position:

> "Let us suppose, for instance, that by some accident no list was taken of the city of Cincinnati, or that the list was lost or destroyed before the Assembly had fixed the levy for State purposes. It is evident that the grand aggregate of the State would be greatly diminished, quite as much so as it has been under the 10th section complained of. But would it follow that no tax for State purposes could be levied in the State? Could every tax-payer out of Cincinnati obtain an injunction because the want of the Cincinnati list had increased the rate of taxation upon his property?"—*Ibid.*

Suppose, upon the other hand, that the list of Cincinnati was preserved, and that of all the balance of the State "lost or destroyed before the Assembly had fixed the levy for State purposes," could the entire amount required for State revenue be levied on the valuation of the city of Cincinnati? Suppose further, that the list for the balance of the State was not "lost or destroyed," but that the balance of the State, controlling the Assembly in both branches, had willfully allowed the lists of the entire State, except of Cincinnati, to be kept out of view, and levied all upon the valuation of that city! Could no complaint in such a case be heard from one in Cincinnati, that he had been "onerated with an undue proportion of State taxes?" Would the Court use this language, in that case, with regard to a decision in favor of relief?

> "If we so hold, we must be prepared to say that whenever an assessor, either wilfully or innocently, omits to get a list of all taxable property within his jurisdiction, no taxes can be collected at all; for by such omission, those whose property is listed are taxed more than if the omission had not occurred."—*Ibid.*

Both illustrations indeed, show the whole question to be one of degrees. The rule, *ut magis res valeat quam pereat*, is applicable here, and covers the whole ground. That rule has limits, and the limitations are as applicable as the rule. That one which here concerns us goes to the effect that willful or systematic departure from a rule of valuation which the law prescribes is cognizable as a breach of law, and this although the law provide for exercise of judgment in the valuations which are made under the rule. This limitation is itself a rule borne out by a whole current of authorities.

> "A discretionary power cannot excuse an officer for refusal to exercise his discretion. His judgment is appealed to; not his resentments, his cupidity or his malice. He is the instrument of the law to accomplish a particular end, through specified means; and when he purposely steps aside from his duty to inflict a wanton injury, the confidence reposed in him has not disarmed the law of the means of prevention. His judgment may indeed be final if he shall exercise it; but an arbitrary and capricious exercise of official authority, being without law, must, like all other wrongs, be subject to the law's correction."—*Merrill v. Humphrey*, 24 *Mich.*, 170.

"Assessors, indeed, are clothed with a power which is *quasi*-judicial, but fraud vitiates even the most solemn judgments of courts, and the action of these *quasi*-judicial bodies cannot stand on any higher ground. It may be that all presumptions should so far favor their actions as to protect them against personal actions at the suit of parties aggrieved ; but such presumptions cannot preclude enquiry where their action is questioned for fraud. The policy of the law may protect the person, but it would be defeated if legal effect should be given to such fraudulent levies."—*Cooley on Taxation*, 157.

"That this exemption was illegal, was scarcely contested. I shall therefore make no effort to show that the common council had no power to suspend or repeal the general law of the State, declaring what property shall be taxable and what exempt. But the important question presented is, whether, conceding it to have been entirely unauthorized, it vitiates the tax assessed upon other property? And upon this question I think the following rule is established, both by reason and authority. Omissions of this character, arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws is entrusted, do not necessarily vitiate the whole tax. But intentional disregard of those laws, in such manner as to impose illegal taxes on those who are assessed, does. The first part of the rule is necessary to enable taxes to be collected at all. The execution of these laws is necessarily entrusted to men, and men are fallible, liable to frequent mistakes of fact and errors of judgment. If such errors on the part of those who are attempting in good faith to perform their duties, should vitiate the whole tax, no tax could ever be collected. And therefore, though they sometimes increase improperly the burdens of those paying taxes, that part of the rule which holds the tax not thereby avoided, is absolutely essential to the continuation of government. But it seems to me clear that the other part is equally as essential to the just protection of the citizen. If those executing these laws may deliberately disregard them, and assess the whole tax upon a part only of those who are liable to pay it, and have it still a legal tax, then the laws afford no protection and the citizen is at the mercy of those officers, who, by being appointed to execute the laws, would seem to be thereby placed beyond legal control. I know of no considerations of public policy or necessity, that can justify carrying the rule to that extent. And the fact that in this instance the disregard of the law proceeded from good motives, ought not to affect the decision of the question. It is a rule of law, that is to be established; and if established here, because the motives were good, it would serve as a precedent where the motives were bad, and the power usurped for purposes of oppression.

In *Henry* v. *Chester*, 15 Vt., 460, the Court says: "It is indispensable to the legality of any tax imposed by the town, that it should have been made upon a list of the polls and rateable estate of the inhabitants, in substantial and *bona fide* compliance with the requisitions of the statute." And again: "Upon two grounds, then, we think this was a void list. If The plain and obvious requisitions of the statute in regard to making up the list, were disregarded both by important and essential *omissions*, and by *arbitrary additions*, without even the color of right or legal warrant. If this may be done and still the list be regarded as legal, so might it with equal propriety if the entire real estate in the town were omitted, or inserted wholly at random, without even the form of an appraisal."

The court also quotes the following rule, as stated by Chief Justice Shaw, in *Torry* v. *Millburry*, 21 Pick, 65:

"One rule is very plain and well settled, that all those measures which are intended for the security of the citizen, for securing an equality of taxation," etc., "are *conditions* precedent: and if they are not observed, he is not legally taxed, and he may resist it." True, the Court then adds as a qualification of the general proposition: "that these measures, in order to become 'conditions precedent,' must be such matters as enter into the frame-work of the assessment, and affect its principles and not its details merely." But it is evident, from the remark before quoted, that they considered "important and essential *omissions*," "without the color of right or legal warrant," as having such effect And it seems very evident that they would have; because one of the essential elements of the validity of a tax is, that it should be assessed upon a list embracing the taxable property of a district, made out with as much accuracy as results from a *bona fide* attempt, on the part of those who make, to fulfill their duty according to law. And when such a list is not had, but instead of it one in which those whose duty it was to make it, have intentionally included only a part of the taxable property, and left out an important part, the essential basis of a legal tax fails, and the necessary result is a destruction of the equality of taxation," all "measures" to secure which, in the language of Chief Justice Shaw, are "conditions precedent" to the legality of the tax.

"In the subsequent case of *Spear* v. *the Town of Braintree*, 24 Vt., 414, the same rule is re-asserted, though in that case they held the error complained of to be a mere error in judgment, in a *bona fide* attempt to fulfill the duties of the office according to law. And they distinguish it from the case of *Henry* v. *Chester*, by saying: "That case was decided, as it was, chiefly upon the ground that the defects in the list could not be fairly regarded as accidental or *bona fide*."

In *The State* v. *Branin*, 3 Zab. N. J., 484, it was held, that where an assessment was made in the city of Trenton for city and county purposes, a separate poll tax being required by law for the city tax, and only one poll tax was assessed, the whole assessment was void.

In the subsequent case of *The State* v. *The Collector of Jersey City*, 4 Zab., 108, the assessor had omitted to assess the churches, and the court held that it did not avoid the whole tax. But they place it upon the ground that it was a practice that had universally prevailed in the State, and in accordance with a contemporaneous construction of the law, "which they would probably have sanctioned, had the question been formerly raised." It is true, they add, that for an omission to assess property really taxable, the assessment ought not to be held void, but that it is a matter to be left to the vigilance of the assessor. But they qualify this by adding "unless it be in cases involving a palpable and greatly injurious disregard or misconstruction of plain requirements of the law."—*Weeks* v. *The City of Milwaukee*, *X Wis.* 207-210.

The law to be considered in the case at bar is the provision of the Constitution, and the rule prescribed is uniformity according to the value, "so that all property employed in banking shall bear a burden of taxation equal to that imposed on the property of individuals." In the presence of a systematic breach of uniformity in this particular, the appellee may spare a demonstration as to whether each of the assessing bodies has a distinct legislative sanction for the course it has pursued, so that the fault is with the Legislature, or the assessors in one case have misconstrued or disobeyed the Legislature. The question has, however, interest for the Court, in view of the result of the decision.

Considered from the point of view of these authorities the case at bar requires only proof of the averments. The case as stated is substantially that while all other property within the city, county and State, is appraised for taxation at but little more than one third of their value,—bank shares, including those of the complainant, are appraised at their full value, and that this difference is not accidental So far as the effect upon complainant is concerned, this is equivalent to saying that two-thirds of all the property except bank shares has been omitted systematically, and entirely exempted from taxation. The application of the rule being a question of degrees, it seems that the extent here proposed is sufficient, if such a thing is possible at all. Even the question of Judge Thurman, how shall we know how much has been omitted, seems to be answered here, if the case as stated is made out.

Coming then to the proof, the first proposition, that bank shares, including those of the complainant, have been appraised at their full value, and no more, is not only not denied, but is common to the pleadings and averments on both sides, besides appearing in complainant's evidence.

As to the second proposition, that there was a systematic and undue depreciation in the valuations of all other property within the city and the county and the State, the evidence is as follows:

Wilson W. Griffith, president of the complainant bank, who states that having lived many years in Toledo, and having been from 1870 to 1876 a member of the City Board of Equalization, he is familiar with the valuation for taxation of the city property at large; that valuations for the year in question stood uniformly in a ratio to the true value in money of not more than forty per cent; that such a ratio to the true value in money has been purposely adopted by the several successive city boards of which deponent was a member, and, as deponent believes, obtains and has obtained elsewhere, in the County and State, and from time immemorial.

E. W. Lenderson, County Auditor from 1870 to 1876, and as such charged with the duty of recording valuations, testifies also to the fact that city property in 1876 was valued for taxation uniformly in a ratio of not more than forty per cent. of its actual value; and also to a rule for valuation in that ratio to actual value as having been adopted by all of the successive city and county boards, of which affiant was by virtue of his office continuously a member.

This witness further testifies to the same actual ratio of the valuation for tax purposes to the true value, as prevailing uniformly in the county, outside of Toledo, and that this results from a rule adopted by the county boards, ashas been said.

He further states the fact, that the same actual ratio of tax-valuations to true value prevails in various other counties known to him, and illustrates the prevalence of of such a ratio throughout the State by the fact that a meeting of many County Auditors in 1870, which he attended, resolved that the decennial valuation of the realty that year should be prepared for the decennial State Board upon a basis of one-third the actual value, and that the valuations of his county, being made upon that basis, were passed upon without material change by the decennial State Board of Equalization, and that the valuations of the personalty were adjusted to that ratio.

Theodore Williams and D. W. H. Howard, both of whom were members of the decennial State Board of 1870, testify that a ratio to actual value bordering upon one-half was by that board adopted as a basis of tax-valuation.

Six of the eight ward assessors of Toledo, for 1876, testify that before commencing work a meeting of assessors for that year was held was held in pursuance of the statute.

SEC. 56. "County Auditors shall, before the fifteenth of April, annually, issue a call to all the assessors of his county to meet at his office, or some other place at the county seat, within five days, for consultation; and said Auditor shall meet with said assessors, and answer such questions and give such instructions as shall tend to a uniformity in the action of the assessors in his county. And said Auditor shall deliver to said assessors blank forms and instructions, or forward them to the township clerks immediately after said meeting of assessors; and the Auditors of counties and assessors of townships and wards shall in all respects, except as hereinafter provided, be governed by the rules and regulations contained in the several acts prescribing their duties."—*Swan & Sayler*, 759.

At that meeting it was resolved that valuations in the city and county for that year should be made on the following basis:

Personal property (except money) at one-third of its value.

New structures at one-third their cost.

Money at six-tenths its amount.

This general average of one-third, it will be noticed, was adopted at a meeting which the law directs shall every year be held in order that assessors may learn how to make their assessments *uniform* with the other valuations.

No proof in contravention of complainants' evidence, or any part of it, was offered, or could be.

Against this, it is urged that the laws of Ohio permit entire disregard each year, by any local board, of the decennial valuation of the realty, provided the board does not go below it; and proof that the decennial valuation was below the value is sought to be rebutted by an alleged presumption that the annual valuation in this instance is upon such readjusted scale.

The laws of Ohio do not support either the position taken as to the powers of local boards, or the presumption sought to be established. The annual assessors are empowered to assess only such lands as have escaped taxation, or have been improved. The annual boards are authorized to equalize these assessments with the average valuation of the real property, as fixed by the decennial State board. There was no need, however, of depending on presumption, which, if it existed in the case at bar, is overwhelmed by proof. Complainants' proof is positive; and if it were at variance with the truth, the truth could easily have been, and assuredly would have been, shown to be upon the other side. The learned counsel for appellant never would have left the truth of the whole case to hinge upon a shadowy presumption, when the truth itself required but a simple statement from the board, or some of them, that they had meant to fix the valuations at "the true value in money" in its ordinary sense, or even that they had not purposely depreciated the assessments from that standard.

Complainants' proof is not at all confined to, and, indeed, it makes slight use of the decennial valuation. Numerous witnesses declare their actual knowledge of the year in question, that a depreciated basis was in uniform and actual operation as to property at large; further, that this was systematic and intentional, the avowed purpose of the boards and the assessors, as themselves state in the record, being to establish such depreciation as a rule.

Another suggestion which is sought to be opposed to this, is that the individual tax-payer is required to submit to the assessor a sworn schedule of his personalty, valued by himself; and that complainants' position involves a charge of universal perjury by the tax-payers themselves.

Two answers are at hand to this extraordinary proposition. First, there is nothing in the law which governs the assessor requiring him to adopt the valuation of the owner—that is for his information only; second, these lists embraced the personalty only, and in fact, as is notorious, were made with reference to the average valuation of the realty, and under that construction of the law which this implies, just as the assessors swore when they were through, and honestly that they had made the valuation as directed by law.

Nothing indeed could well be plainer than complainants' proof of a construction which, however much at variance with the purpose of the law, is yet prevailing and inveterate, and paramount in the administration of the law. Indeed, the prevalence of such constructions is within judicial notice.

The force of practice in a case like this, to give to any such construction all the force of a law changed to correspond with it, has frequently received judicial recognition.

"And here we might say, more explicitly than was said in that case, that a long, uniform and unchallenged practice under a law, is strong evidence of the real meaning of the law. To the hoary maxim, *contem-*

poranea expositio est optima et fortissima in lege, is accorded full force in all the courts, and we have rendered it due respect."—*C. & N. W. Co.* v. *Boone Co., XLIV Ill.* 243.

"Although if it were now *res integra,* it might be very difficult to maintain such a construction, yet at this day the *argumentum ab inconvententi* applies with great weight. We cannot shake a principle which in practice has so long and extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long and continued usage furnishes a contemporaneous construction which must prevail over the most technical import of words."—*Rogers* v. *Goodwin,* 2 *Mass.,* 477, 478.

"A contemporaneous is generally the best construction of a statute. It gives the sense of a community, of the terms made use of by a Legislature. If there is ambiguity in the language, the understanding and application of it when the statute first comes into operation, sanctioned by long acquiesence on the part of the Legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law ; and after it has been acted upon for a century, nothing but legislative power can constitutionally effect a change."—*Packard* v. *Richardson,* 12 *Mass.,* 131, 143.

Says Lord Mansfield : " When solemn determinations acquiesced under, have settled precise cases and a rule of property, they ought, for the sake of certainty, to be observed, as if they had originally formed a part of the text of the statute ;" and this doctrine has been repeatedly recognized. " Whatever might be our impressions were the matter *res integra,*" says the Supeeme Court of Louisiana, "we deem it important in the construction of statutes, to adhere to what has been already adjudged. The judicial interpretstions becomes, as it were, a part of the statute, and should not be changed but for the most cogent reasons."

Of a similar value in regard to the construction of the statutes is usage, or the construction which custom or practice has put on them.

> "*Optima legum interpres consuetudo.*" The wisdom of this principle is asserted in the civil law. "*Imperator Servus rescripsit, in ambiguitatibus quae ex legibus proficiscuntur consuetudinem aut rurum perpetuo similiter judicatarum auctoritatio, vim legis obtinerere debere.*" "It is the common opinion," says Lord Coke, "and *communis opinio* is of good authority in law. *A communi observantia non est recedendum.*"—*Sedgewick on Construction, p.* 216.

> "The practical construction given to a statute by the public officers of the State, and acted upon by the people thereof, is to be considered, and is perhaps decisive in case of doubt."—*Union Ins. Co.* v. *Hoge*, 21 *How.* 35.

The practical effect of such a ruling, when applied in this case, can be easily demonstrated. There is in Illinois a State board of equalization for shares generally. The workings of that board are known to this Court through the well-known State Railroad Tax Cases.

It is of record in those cases that the Illinois State Board, recognizing each year the fact (which is indeed within judicial notice) that popular construction of tax-laws does everywhere prevail over their real meaning, passes each year a resolution to abate from its own valuations a percentage such as will depreciate them to the basis which in its judgment prevails throughout the State as to the property at large. In the late case of *Law et al.* v. *The People et al.*, 87 Ills., 405, this situation is fully discussed.

> "As we understand the record, the State Board did estimate the fair cash value of all that class of property which the law made it their duty to do, and their action in that respect is not called in question. As we have seen, all other property in the State had been assessed at one-half its cash value. Under the law, the State board had no power to increase the aggregate valuation beyond one per cent. on such aggregate assessed valuation. It became a question, What was to be done? Whatever

may be the statutory injunction as to making valuations of property for taxation, the controlling authority as contained in the Constitution is, it shall be so valued that every person and corporation shall pay a tax in proportion to his or its property. Under the circumstances, had the State board set down the property of corporations at a fair cash value, as ascertained for the purpose of taxation, then such property would have been subjected to an increased taxation in proportion to property of other owners, which the constitution positively inhibits. Observing the constitutional injunction, rather than a literal compliance with the statute, the State board equalized the valuations of that class of property at the same ratio adopted by local officers in fixing valuations of other property in their several localities. Any other rule would have been most unjust as well as in contravention of the Constitution. Under the rule adopted, every person and corporation is made to pay a tax in proportion to the value of his or its property. It was the only rule that could have been adopted to secure anything like uniformity in valuation for taxation. A strict observance of the statute, in that respect, would have worked manifest injustice, as well as a plain violation of that constitutional requirement, that the burden of taxation should be made to bear equally upon all property, whether owned by private persons or by corporations. That which the Constitution imposed was the higher duty, and the State board was not at liberty to disregard its provisions. This view of the law was sanctioned in *Bureau County* v. *Chicago, Burlington & Quincy Railroad Co.*, 44 Ill., 229.

If the Ohio board had pursued such a course this case would not be here. The Court below simply applied the same rulings as obtain in Illinois, with the result that no injustice has been done to any one, the tender made and paid being the full amount that equity required.

The case of *Bureau County* v. *the C. B. and Q. R. R. Co.* is so perfectly the same case as is now presented to this Court, that I cannot but quote it at some length.

Perhaps no better expression could be framed, condensing into one, all the provisions of the Ohio constitution on the subject of taxation, than that found in the Illinois constitution.

> "The General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property."—*Sec. II, Art. 9.*

The law in the case mentioned provided that—

> "Each separate parcel of property shall be valued at its true value in money, excluding the value of crops growing thereon; but the price at which such real property would sell at a forced sale shall not be taken as a criterion of such value; and personal property of every description shall be valued at the usual selling price of similar property at the time of listing, and in the county where the same may then be; and if there be no selling price known to the person whose duty it shall be to fix a value thereon, then at such price as it is believed could be obtained in money therefor at such time and place."

The same act provided that every owner of real property should list it in the town or district in which the property belonged, and personal property should be listed in the town or district in which the person resided.

The section first above quoted is copied from the Ohio law for the government of assessors. In further conformity with our legislation, it was provided that a Board of Supervisors should meet to equalize the assessment of property throughout the country.

Under this law the R. R. Co. listed its lands in the county, at a given valuation.

It was in evidence that this valuation was higher than the average assessment of property of equal value through the county. Nevertheless the Board added to the valuation of the R. R. lands forty per cent., leaving the other valuations through the county practically undisturbed. All the valuations, including that of the R. R. Co. when increased, were still below the actual value. The R. R. Co. appealed to the Circuit Court, which revoked the action of the Board. The county then took the case to the Supreme Court. The Court says:

> "The framers of the constitution and our law makers, to their credit be it said, have kept steadily in view the principles of equality and justice in adopting a system of taxation which commends itself to the favor and approbation of all well organized minds. It is no argument to urge that the fault is with the assessors in the case of individuals, and with railroad companies in making out their schedule for the County Clerk. If the assessors violate their duty, are railroad companies to be the sufferers? If they neglect to act fully up to all the requirements of law, is that any reason why A should pay forty per cent. more taxes in proportion to value, than B? The rule adopted by the assessors in this State has grown into a custom, and has been tacitly sanctioned by every department of the government for a long course of years, and it is now too late to challenge it. Even so late as the last special session of the Legislature, that body, by clear implication; acknowledged the custom and yielded to its influence, by the provisions of the act to tax the shares in National Banks, They therein impliedly declare that such shares are to be taxed the same as other property. A share of bank stock under that bill, is not required to pay more state or local taxes than a piece of land, or a house, of equal value; and the plain inference is, if such property be assessed on only one-third of its actual value, bank stock shall be assessed on the same per cent. of its actual value. Would not the sense of justice of every man in this community be outraged by allowing this or any other depreciation to one class of people, and demanding of another a higher taxation on a similar article of the same

actual value? The proposition cannot commend itself to the favor of any just man, and can receive no countenance in a court of justice."

"It is an admitted fact on both sides to this controversy, that the property of no one owner in the county of Bureau has been taxed on its real value, and that the per cent. added by the board of supervisors to the valuation of the property of appellees, imposes on them a greater proportionate burden than the law requires them to bear. We are of this opinion, and therefore consider the action of the board unfounded in justice, and in direct opposition to the constitution. The great and attractive feature of uniformity has been disregarded by the board, and appellees victimized. It may be very desirable that the greatest share of the public burdens shall be borne by these corporations, but until there be a radical change in our fundamental law it cannot be done. They stand on the platform of equality before the law, and no greater burden for the support of government can be imposed on them than can be placed on the individual tax payer."

"Entertaining these views, we must affirm the judgment of the LaSalle Circuit Court. The action of the board of supervisors of Bureau County was *ultra vires*, and cannot be sanctioned by this court."—*Bureau County* v. *Chicago, etc. R. R. Co.*, 44 Ill., 239.

It would apparently be difficult to refuse the relief sought by the present complainant, without disregarding alike the authority and the principles of this careful and elaborate decision.

Counsel attempt to quaiify the force of these decisions by referring to the State Railroad Tax Cases already mentioned, as being also from Illinois, and embodying some qualifying limit to the rule of uniformity. That State board, in those cases, has been shown to have adopted perfectly and from the start that which is here contended for in the original complaint, so that the issue here contended for could not in those cases arise. If anything in those cases does qualify the rule of uniformity, it is by the permission of diversity of method so long as the result is uniform, and in this respect is grounded upon a provision of the Illinois Constitution as to which it differs from the Constitution of Ohio, a provision that each tax-law shall be UNIFORM AS TO THE CLASS OF PROPERTY ON WHICH IT OPERATES, a provision which, in a time of popular excitement, was put there by the last Constitutional Convention, and has no place or parallel in the Constitution of Ohio.

The force of this administrative construction, which is practically given to the tax-laws of Ohio, has full legislative recognition.

The proceedings of the late decennial State Board offer an apt illustration of this process and its effects. Prior to the assembling of that board, the Auditor of State was directed by law to issue instructions to County Auditors, and through them to the assessors, as to making the assessments upon which the board would act. December 30th, 1869, that officer issued his circular, in which, among other things, he expressly set out the laws requiring that "the usual selling price" shall be the basis of assessment, and urged upon assessors the advantage of "a large basis of taxation."

January 10th, 1871, the State Board then in session unanimously addressed a memorial to the legislature, in which the board recite that they find the average increase in the assessments of real property thus made over those of 1859 to be *eighty-one* per cent.

The law as it then stood, prohibited the State Board from reducing the grand aggregate of the assessments more than ten million dollars. In view of this the memorial recites:

> "We are now limited to a reduction of the present aggregate, of less than one per centum, a margin so inadequate that we are left powerless to equalize by an uniform rule, without leaving the real estate at a valuation largely in excess of its true value in money. This board, therefore, as in duty bound, unanimously and respectfully prays that its discretion to reduce, be so increased that it will be enabled to equalize as uniform justice shall require: *Provided*, That in no event the grand aggregate of taxable real property be brought below one thousand million dollars, or that such other discretion be extended to this board as in your opinion the interest of the people of Ohio demand."

The Legislature in response enacted, March, 1871, the present law, as given on a preceding page, granting the power as requested, to reduce the grand aggregate "not to exceed twelve and one-half per centum of said aggregate." The board thereupon proceeded after equalizing the several counties as between themselves, to make a sweeping reduction of twelve per cent. *pro rata*, the result of which was to reduce the assessments in seventy-five counties in the State by an aggregate sum of one hundred and thirty-five million, three hundred and seventy-five thousand seven hundred and seven dollars, ($135,375,707,) while it added to those of the remaining twelve counties, the aggregate sum of two million seven hundred and thirteen thousand two hundred and forty-five dollars ($2,713,245).

Here is the whole case in a nutshell. The assessors were directed by law to value the property assessed at the "true value in money." The average of the assessments represented the average of their interpretations of that phrase.

In giving it a meaning, many of them had been governed by the exhortation of the Auditor of State to regard strictly the "usual selling price," and to depart from a custom of assessment which was even then historic, and which from the testimony in this case, appears to be inveterate. The result of even this partial departure was, as we have seen, an increase of the average by eighty-one per cent. Concerning this, the Board say:

> "We find too, that the increase is distributed over the State with marked inequality. There are counties in every quarter greatly below the average ratio, and other counties greatly above it."

The State Board wholly repudiated this departure from the ancient rule of valuation.

> "As the board is constituted," says their memorial, "it is simply impracticable, not to say that it would be oppressive, and therefore unjust, to bring the counties which are below the average rate of increase so near it as to furnish relatively the necessary relief to those which are in excess above."

That is to say, in fixing a standard for "the true value in money," a difference arose between the State Board and some of the Assessors. The Assessors had rated real property at the usual selling price; the Board thought this value too great, even when reduced by general average. The Legislature was appealed to, and did expressly authorize the standard suggested by the Board.

The real property of every county was thereupon adjusted to this rule, and when adjusted, certified back by the Auditor of State. Each County Auditor then took the personalty as adjusted by his County Board and added or subtracted the percentage requisite to conform it to the action of the State Board upon the realty. Taxation was then uniform throughout the State.

The permanency of the result is easily shown. The total valuation of the real property in Ohio, as fixed by the decennial State Board for 1870 was $1,013,444,506; the valuation of the same property in 1878 was $1,091,116,682, an average increase of about one per cent. a year, which represents additions to the valuation from new structures. The personalty corresponds.

The result of this action by the Legislature is that the total valuation of the realty in Ohio now in force since 1870, differs from that in force from 1860 till that time by only *sixty* per cent., instead of *eighty-nine.*

Suppose the Legislature had refused to change the law as requested by the Board, and thus the Board had only been able to reduce the grand aggregate of the value of real property in Ohio by "less than one per cent." instead of twelve per cent. as was afterwards effected; then obviously, the valuation of the real property in the different counties as equalized by the State Board before the reduction of twelve per cent. *pro rata* from the aggregate thus equalized, must have been the "true value in money" of the real property in Ohio, (which is two-thirds of the duplicate,) for *that* year. Consequently, when that reduction was voted, the effect of that vote was to make the "true value in money" of real property in Ohio for that year, twelve per cent. less than it would otherwise have been. As we have seen, if the higher valuation had been the one adopted, no one of the successive annual city or county Boards could in any instance have *reduced* the aggregate valuation of the real property within its limits, "below the aggregate value of the real property as fixed by the State Board."

Hence the Legislature of Ohio, in 1870, practically granted to all property in Ohio, a reduction of twelve per cent. upon its assessment for taxation, which reduction is still unvaried and in force.

It is equally plain that the Legislature and the Board might have agreed together upon a reduction of twenty-four, or forty-eight, per cent., instead of twelve, and that in such case the "true value in money" for taxation, would have stood to the actual value in a ratio proportionately less.

Can the same Legislature, in 1876, turn about and create a new board of assessment, not for one species of property, but for that property which belongs to one class of persons, *i. e.* these corporate persons, by which board this reduction shall not necessarily be granted, and by which, in fact, it has not been conceded; and such act of legislation be pronounced conformable to the "uniform rule" which the constitution requires ?

We are not here insisting that this court shall pronounce in favor of the prevalent construction, and against all efforts of the legislature to return in practice to "the true value in money" as a basis of assessment; we are simply here insisting that the measures shall be comprehensive and not special, and the result reasonably uniform, not wilfully oppressive.

There are not wanting strong and recent cases that go further and declare that the entire assessment is annulled by such irregularities as the case at bar discloses.

"Incidentally, however, it appears in the case that the assessed valuation for the year was arbitrarily fixed by the assessors at one-fourth the cash value. This was in open defiance of the statute and of the oath which the assessors had taken to perform faithfully their duties. The statute commands an assessment at the true cash value. (*Compiled Laws*, §984). Had the statute been obeyed, the tax would not have been excessive. But the assessors saw fit to disregard it, and the natural consequences followed; having begun the tax proceedings with an illegality, it became necessary to violate the statute throughout. This is not a creditable showing for the authorities, nor can a shadow of excuse be given for it unless the habitual disregard of the statute in other localities can be said to excuse. This is, of course, no authority whatever. Because other officers openly and notoriously disregard the statute and their official oath, it is no reason why the assessors of Lapeer should do the same. Neither can it be any reason why the courts should sustain an exaction which has the forms of a tax, but which the statute forbids."—*Wattles* v. *Lapeer*, Mich. Sup. Ct. *Cooley J.*, 1879.

Doubtless taxes are a debt due to the State by its citizens for protection in life, liberty and property. *Ward* v. *Supervisors*, 14 Wis., 618. But the debt is liquidated, and matures only upon a valid exercise of the taxing power. Here the exercise of the taxing power must be upon a uniform rule; and it is only upon an equal assessment, as the foundation of uniform apportionment, that the taxing power can be put in operation. The statutes of the States generally provide for assessment, as "an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation; and when they so provide, the assessment became an essential part of the process in the collection of taxes." (Cooley on Tax, ch. xii.) But, under our Constitution, the assessment is not only an essential part of the process, but seems to be jurisdictional. For in no other way does it appear possible to collect taxes upon the property by uniform rule. Indeed, the Constitution so clearly implies uniform assessment of value as an essential prerequisite to taxes upon property, that it is not unsafe to hold that the Constitution itself makes such assessment jurisdictional. It is certainly so by statute. And such a tax, to be valid under the Constitution, must proceed upon a regular, fair and equal assessment of the property to be taxed, made by the officers in the manner and with the securities and solemnities provided by statute. These last the legislature may make and alter at pleasure; but no statute can dispense with assessment, or with its essential fairness and equality. (*Smith* v. *Cleveland*, 17 Wis., 556.) For without these, taxes cannot go upon a uniform rule. The uniformity of the rule may be broken as well by inequality of an assessment of values to be taxed, as by inequality of rule in the tax itself. And no tax on property can be supported which does not proceed upon valid assessment, legally made upon uniform rule.

Of course, assessments are as liable to error as other processes. Assessors may commit errors of judgment and mistakes of fact. So that these are exceptional and happen in good faith, not affecting the principle or the general equality of the assessment, they will not vitiate it. So this court has frequently held. *Weeks vs. Milwaukee*, 10 *Wis.*, 263; *Doan* v. *Gleason*, 16 *id.*, *I;* *Hersey* v. *Smith*, 19 *id.*, 615. But, as will be seen by cases cited *infra*, the court has also frequently held that violations or evasions of duty imposed by law to secure a just and uniform rule of assessment, whether occurring by mistake in law or by fraud in fact, which go to impair the general equality and uniformity of assessment, and thereby to defeat the uniform rule of taxation, vitiate the whole assessment as the foundation of a valid tax". * * *—*Marsh* v. *Supervisors*, *Wis.* XLII., 509.

"Little need be said in this case, in view of the decisions in *Hersey et al.* v. *The Board of Supervisors of Barron County*, 37 Wis., 75' and *Marsh* *et al.* v. *The Board of Supervisors of Clark County*, 42 id., 502. In those cases it was held, that, in order to support a valid tax, there must be a valid assessment, made in substantial compliance with the statute; that a proper listing and valuation of the property by the assessor constitute the very foundation of the subsequent proceedings; and that where the assessor makes an assessment in direct violation of the rules and principles prescribed by statute, the tax fails. It is quite unnecessary to restate the argument in support of these results. It only remains to apply the doctrine of those cases to the one before us.

"This case involves the validity of a tax on real estate in Fort Howard, for the year 1874. The plaintiff challenges the validity of the tax on various grounds, only one of which will be noticed. On the trial, James Delany was sworn on the part of the plaintiff, and testified substantially as follows: "I was assessor at Fort Howard in 1874 and made the assessments there that year. I made the assessment upon the basis of about one-third the real value of the property." Indeed the fact is undisputed, that the rule or basis upon which all the real and personal property in Fort Howard was assessed for that year was one-third its actual value. It is very plain that such assessment was wholly unauthorized, and in direct violation of the statute upon the subject. The statute declares that "real property shall be valued by the assessor from actual view at the *full value* which could ordinarily be obtained therefor at private sale, and which the assessor shall believe the owner, if he desires to sell, would accept in full payment."

It was, however, argued by the counsel for the city, that as all the property was valued upon the same basis, the illegality in making the assessment could work no injury to the plaintiff. But, if it be true, as this court has held, that a valid tax must be founded on a valid assessment, the argument proves nothing. There is really no security to the tax payer, except in requiring assessors to perform their duty and make assessments in substantial compliance with the law. For, if the assessor in one town is permitted to assess property at one-third its value, the assessor in another town may assess it at one-fourth, and still another at double its value, substituting the mere caprice of the officer for the rule of the statute, and resulting in the grossest inequalities and injustice in the taxes imposed. Therefore, without considering any other question in the case, we affirm the judgment on the ground that the assessment as made was illegal and void."

"Ryan, C. J. Some surprise and apprehension were expressed at the bar, upon the argument, at an intimation from the bench of the ground of judgment in this case, followed *Hersey* v. *Supervisors*, 37 *Wis.*, 75, and *Marsh* v. *Supervisors*, 42 *id.*, 502.

It was intimated, as it has been on other occasions, that the statutory rule of assessments is frequently or generally disregarded by assessors, and that the consequence of holding assessors to a compliance with their duties under the statute and the constitution, would be disastrous.

It is impossible for me to judge how far so vicious a habit may prevail among assessors. But even if it were universal, it seems impossible to me that it should influence the court to hesitate in giving effect to all the consequences of this willful disregard of duty. If it be true that assessments throughout the State are frequently, or generally, or universally made, in defiance of the statutory rule, it appears to me better that the State, and the municipal corporations of the State, should suffer inconvenience, than that our whole system of taxation should, at the mere will of local officers, be a fraud upon the constitution, and statutes carefully framed in compliance with the constitution.

The question, I think, resolves itself into this: whether statutory officers can, in the execution of their office, willfully disregard the safeguards of the statute which creates their office; whether it is for the legislature to provide for a general and constitutional rule of assessment, or assessors to set the statute at defiance, and to establish, each for himself, several and unconstitutional rules.

The statute is so carefully framed that it does not lightly trust the conscience of assessors. It requires from each a precise and positive affidavit that he has made his assessment upon the statutory rule. If an assessor do not annex his affidavit to his assessment roll, he does not complete his duty, and there is in law no assessment. If the assessor make and annex the affidavit to an assessment made in violation of the statutory rule, he takes an absolutely false oath in the execution of his office. What faith can be reposed in an assessment so made and so verified? *Falsus in uno, falsus in omnibus.* What security is there that such an

> assessment is just, equal or honest, in other respects even upon the rule of the assessor?
>
> It is very easy for assessors to be honest in the discharge of their duties: and if honest, their errors of judgment can operate but little to impair the uniform rule of the constitution. If they should be suffered to substitute a rule of their own for the rule of the statute, and yet to uphold their assessments by an oath that they have followed the statutory rule, it appears to me not extravagant to say that taxation in this State would rest less upon a uniform rule of assessment, than upon a uniform rule of fraud and perjury.
>
> I am quite sure that no argument of inconvenience will ever induce this Court to lend its sanction to such deliberate fraud perpetrated in the name and by the authority of the State, in a proceeding which purports to be a just and uniform exercise of a soverign power. It seems to me that would be a wanton abuse of judicial authority."—*Schettler* v. *The City of Fort Howard*, 43 Wis., 49—52.

These sweeping judgments are employed by appellant's counsel to raise the dust of clamor which they make about the consequences of upholding the judgment of the Court below. "Must the whole long-established system of taxation in Ohio be destroyed?" say the counsel for appellant. One answer is, the reason why these judgments are so sweeping is that they sweep clean; but possibly domestic judgments are more fit than foreign for this office. A better answer is, we have a bit of history which is worth an acre of conjecture. The decision below in this case was rendered in 1878, and its workings are well shown. The cases pending at that time are all disposed of, so far as the writer knows—are all disposed of but this case. In suits brought since, the Court has restrained the authorities only from collecting the excess above the tax upon other property of equal value. The rest is regularly tendered and accepted.

Even this excess, although severe, is no longer so much so as in the case at bar. One of the fruits of the preliminary injunction (granted by Judge Emmons in his lifetime) was that the law of 1876 was changed when a year old.

The act of 1876 left owners of bank shares without even the proof which a comparison by local boards with "other city property of the same cash value" would afford, and it required and left the State board of that year to construe "the true value in money" at its normal meaning, which, in the judgment of the board, required an addition of four millions to the duplicate.

The amendments made in 1877 first require that the exhibits of the property in which the value of bank-shares consists, shall be *first valued by the local boards*, then sent to the State board; second, that body shall equalize these several assessments with what in their judgments shall be, in each instance, "the true value in money," but the aggregate of the assessments by the State board shall not vary from the aggregate of those submitted to it more than the relatively trifling sum of one hundred thousand dollars.

Under the law as thus amended have arisen numerous cases, of which the one from Cleveland is brought here as an example, and is heard with this case. The decree in that case stands against collecting taxes upon an addition to the valuation of the bank, amounting to $250,000, made by the State board over and above the valuation by the local board. That case thus differs from the case at bar in two material features.

1. The fact that a rule of valuation has been applied to the shares of the appellant which differs from that applied to property at large in the same city and county is not left to individual testimony, but by the recorded judgment of the local board is shown conclusively, as is also the degree of difference.

2. There is no direct proof of prevalence throughout the State of the same rule as that prevailing in the city and the county.

The first of these seems to be conclusive, so far as the city and the county taxes are concerned. The Act of 1877, it is true, ignores the fact that some few banks are located in cities large enough to have a special city board, and sends all the exhibits which banks are required to make to the respective "county" boards; and in the brief of the appellant's counsel, much is attempted to be made of this.

This feature of the act has no material significance in even the few instances affected by it. City and County Boards, by the respective laws creating them, are, as has been already shown, controlled by the same rules, to-wit: the rules prescribed by law, which have been given once before.

> "1st. They shall raise the valuation of such tracts and lots of real property, as in their opinion have been returned below their true value, to such price or sum as they may believe to be the true value thereof,"
>
> "2d. They shall reduce the valuation of such tracts and lots as in their opinion have been returned above their true value, *as compared with the average valuation of real property of such county*, having due regard to

their relative situation, quality of soil, improvement, natural and artificial advantages possessed by each tract or lot."

"3d. They shall not reduce the aggregate value of the real property of the county, below the aggregate value thereof, *as returned by the assessors*, with the additions made thereto by the Auditor as hereinafter required. The County Auditor shall keep an accurate journal or record of the proceedings and orders of said board."—*Sayler's Statues. p.* 414.

Here is a distinct phrase, "true value, *as compared with the average valuation of the real property of such county*" in plain contradiction to "true value *in money*." This phrase is expressly laid down and actually observed for the common government of both series of boards. The County Auditor is *ex-officio* a member of both boards. The same persons in large numbers are owners of property in city and county both; the situation and the law combining to enforce upon both boards, in any county where both are, a common rule of valuation. The result, therefore, of upholding the decision of the court below, in the case now considered, will differ immaterially from that of the same course as to the case at bar. In both of them the judgment of this Court is invoked as a final barrier against the systematic application of a rule of valuation to the shares of National banks different from that applied to property at large. The practical effect will be that cities and counties will each in every case receive from banks the same proportion of their revenue as from other property of equal value and within their several limits.

Such differences as may exist between the rules in different counties will leave, as to the amount of State tax paid, a difference between the banks of equal capital in different counties, only the same as that which exists between those counties as to the amount of State tax collected from the property at large, and which the trifling amount of the State tax has, up to this time left undisturbed. There will be not the least disturbance even of the system of assessment, since the only difference now resulting to the system from the new laws of 1876-7 is that an *additional* process is applied by virtue of it to the property of this one class of corporate individuals.

In behalf of revision by this State board as a final process, it is urged that the railroads of the State are also finally appraised by a State board. Certainly nothing else is,—this other one exception is the only one, if even it be such. As to its being such, it may be time enough to try that case when it is reached. It is now pertinent, however, that a railroad does not lie entirely within the jurisdiction of one city board, or county board. The nature of railroads makes it necessary to subject them to some comprehensive jurisdiction; and it is this necessity, and not, as counsel urge, the acquiescence of the companies, which has given permanence to the method by which railroads are appraised.

There are indeed results to flow from the conclusions of this Court, but they are different: and worthier the consideration of a court.

"It is fortunate for the rights of the people when a case occurs causing the Courts to pause and to retrace the boundary of delegated power. Thus the stealthy steps of invasion may be detected and the power denied ere it be too late, and a precedent become fixed beyond judicial control." *Seeley* v. *Pittsburgh*, 82 Penn. St. 260,

"Laws which cast the burdens of the public on a few individuals, no no matter what the pretence, nor how seeming their analogy to constitutional enactments, are in their essence, *despotic* and *tyranical*, and it becomes the Judiciary to stand firmly by the fundamental law, in defense of those general, great and essential principles of liberty and free government, for the establishment and perpetuation of which the Constitution itself was ordained." *Hamett* v. *Philadelphia*, 65 Penn. St., 146.

WAGER SWAYNE,
For Appellee.